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In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

VENTURE TECHNOLOGY, INC.,

Petitioner,

vs.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION AND FLINT OIL & GAS COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. What evidence may the Court of Appeals properly consider in reviewing the denial of a motion for judgment n.o.v. and the underlying verdict, and to what extent may it draw inferences from such evidence contrary to those drawn by the jury?

2. What is the proper measure of the quantum and the nature of evidence required to prove concerted action in violation of Section 1 of the Sherman Act, 15 U.S.C. §1?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

Petitioner, Venture Technology, Inc., was the appellee in the court below. National Fuel Gas Distribution Corporation and Flint Oil & Gas Company, Inc. were the appellants in the court below. National Fuel Gas Company was a defendant in the District Court, but was not a party to the appeal to the Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The following opinions of the Court of Appeals and the District Court are set forth in the Appendices in chronological order:

The opinion of the District Court denying the joint motion of Distribution and Flint for judgment n.o.v. is reported at 1980-81 Trade Cases ¶63,780 (W.D.N.Y. 1981), and is set forth in Appendix A.

The opinion of the Court of Appeals for the Second Circuit, ____ F.2d ____, (Nos. 81-7069, 81-7107, July 26, 1982) is set forth in Appendix B.

The judgment of the Court of Appeals for the Second Circuit, entered on July 26, 1982, is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 26, 1982. This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional and statutory provisions involved are Rule 50 of the Federal Rules of Civil Procedure, Section 1 of the Sherman Act, 15 U.S.C. §1, and the Seventh Amendment to the United States Constitution. They are set forth in Appendix D.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve the conflict among the circuits concerning the proper standard of review of jury verdicts and motions for judgment n.o.v. The conflict centers on the scope of the evidence which the appellate court may consider. The Courts of Appeals for the Second Circuit, the Fifth Circuit and the District of Columbia Circuit hold that they may review *all* the evidence before the trial court and may overturn the jury verdict on the basis of any contradictory testimony. In the instant case, the Court of Appeals for the Second Circuit ("Second Circuit") reversed a jury finding that the defendants had conspired. The Courts of Appeals for the First and Third Circuits follow a more restrictive standard, limiting their review to the verdict winner's evidence and the uncontradicted and unimpeached evidence of the party seeking to overturn it.

This Court recently defined the limits on appellate review of judgments in bench trials.[1] In order to promote the consistent administration of justice, it should review the standard applied to appeals involving jury verdicts.

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[1] *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L. Ed.2d 606 (1982); *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ___ U.S. ___, 72 L. Ed.2d 66 (1982).

A. *Proof at Trial*

Petitioner, Venture Technology, Inc. ("Venture"), brought this action alleging, *inter alia*, that the defendants had conspired, in violation of §1 of the Sherman Act, to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County. As the public gas utility in western New York and parts of Pennsylvania and Ohio, defendant National Fuel Gas Distribution Corporation ("Distribution") was the market for that gas. Defendant Flint Oil & Gas Company, Inc. ("Flint") was one of the two largest local gas producers, having drilled 100 to 200 wells by 1975. The concerted action of Distribution and Flint was evidenced in part by the long-standing relationship between Flint and Distribution's Assistant Secretary and Director of Gas Purchases, John Fox ("Fox").

Designated by Distribution as the "enticer", Fox was charged with attracting gas producers to western New York (1108-10).[2] Distribution's vice president instructed him to "render Flint every possible assistance" in its effort to "get off the ground" (1167-68). From Flint's beginnings, Fox had substantial contact with its principals, particularly its president, Salvatore Giallombardo ("Giallombardo"). For substantial fees, Fox of Distribution helped Flint accumulate drilling acreage (855-58). He also attended meetings of its investors, although there was no evidence that he ever did so for other producers (869-70; App. A-6). He met frequently and privately with Flint's officers to provide "advice and counsel" (872-73, 1412-13, 2150).

Fox also dealt with Flint through Priority Acquisitions ("Priority"), a real estate firm which he owned and operated with his wife. Indeed, Flint was Priority's *only* client (860-61). Fox obtained numerous leases for Flint, receiving commissions for each from Flint (855-58).

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[2]References in parentheses are to the Joint Appendix filed in the court below, unless preceded by "App.", in which case the reference is to the Appendices annexed to this petition.

Fox negotiated Flint's purchase of a 167-acre parcel in Alden, New York, the only land which Flint purchased rather than leased (2164). Flint paid $100,460 in 1973 and sold it in January 1980, during the course of the trial, for $102,000. One of Flint's principals characterized the $17,000 commission paid Fox as a "token of appreciation" for the "considerable favors" Fox had done for Flint (113-18, 2155-58).

Distribution's management was aware of Fox's relationship with Flint and condoned it. Indeed, Distribution's vice president, when informed of these dealings, stated "by all means do it" (1116). One of Distribution's chief geologists testified, however, that Distribution admonished him against independent business dealings with any producer to avoid potential conflicts of interest (1228-29).

In 1975, Venture entered the stage already occupied by Distribution and Flint. Distribution was experiencing a severe gas shortage, and William Waytena ("Waytena"), Venture's President, had become disgruntled with his investment in Flint. Together with two others, he formed Venture. By November, Venture was prepared to drill on three properties, designated at trial as the Boyd, Grant, and Frey parcels.

Its representatives met with Distribution on November 19, 1975, receiving assurances that Distribution would issue commitment letters to purchase the gas from the Boyd and Grant wells, although it would not enter into a purchase contract until the New York State Public Service Commission ("PSC") had acted on its application for approval of a price escalator clause in its contracts. Distribution also indicated that it was preparing a well-spacing policy, which would relate to the size of parcels and the distance between wells, but assured Venture that the policy was not final and would not apply to the Boyd and Grant wells (413). Although a draft was available, Distribution withheld its terms from Venture (1260).

Venture also learned then that Fox was directly overseeing its operations, a curious practice in view of his transfer to Houston. Furthermore, by October 1975 Distribution used a committee to oversee local gas production. Fox's role was limited to problem applications (740). Venture was the only "problem" identified at trial.

His departure from Buffalo did not end Fox's contact with Flint. He spoke frequently with Giallombardo by telephone and visited Flint's offices during each of his semi-monthly visits to Buffalo. Fox testified that during one conversation Giallombardo "expressed grave concern" and began to "rant and rave" about Venture's drilling in an area where Flint also had wells (953-54). A Flint employee testified that at another time Giallombardo was "very upset" about a Venture well located near one of the better Flint wells (1595-96, 1601).

On November 21, 1975, Venture received a copy of the spacing policy, dated November 1, 1975. It provided that Distribution would neither sell nor transport gas produced from parcels of less than 40 acres or from wells within certain minimum distances from lot lines and existing wells. On December 3, 1975, Fox told Venture, for the first time, that Distribution would not purchase gas from the Boyd and Grant wells, stating that they violated the spacing policy, which was applied to Venture retroactively. Although the parcels were less than 40 acres, each well location exceeded the minimum distance from any existing well — the only meaningful condition necessary to prevent intercommunication between wells, the avowed purpose of the policy (1202-03, 1227-28).

The circumstances of the policy's promulgation were in dispute. Fox drafted it hastily, coincident with his many communications with Giallombardo (679, 1079). Fox indicated there was no need for the policy prior to the fall of 1975, because "the problem had not existed except for a short

time prior to this" (974). Another Distribution officer testified that the policy was conceived in "rump sessions" over coffee as a solution to the "little problem" and "presto that was settled on" (1253-58). It was finalized without consultation with Distribution's Senior District Geologist (1195).

Distribution also refused to issue a commitment to purchase the gas from Venture's Frey well. Before Venture could drill, Fox indicated that its well was too close to a proposed Flint well, although Venture's well complied in all respects with the spacing policy, a fact admitted by Distribution's Director of Local Gas Purchases (744-45, 754, 2345). On December 23 1975, Frey's attorney declared the lease null and void because drilling had not commenced within the time provided. On the very next day, Frey leased to Flint. Flint's well, in which each of its principals invested, clearly violated the spacing policy. (746-49, 1082-84, 1438-42, 2351-57, 2386).

Giallombardo previously told Frey that Venture would be unable to sell the gas (167). In December, he assured Frey's attorney that "there would be no problem in selling gas" if Flint drilled (544-45). After Frey had terminated the Venture lease, Fox recommended that he contact Flint, among other producers (979).

Distribution and Flint attempted to explain these curious circumstances by claiming that Flint attempted to "accommodate" Venture. Distribution's officers testified that they urged Flint to defer drilling its other well in order to provide time to reach a solution. That request came on December 17, 1975, well after the original 30-day period of the Venture lease, and close to year's end, the deadline set by Frey for his tax purposes.

In addition to the spacing policy, Distribution claimed that its pending PSC application precluded a commitment to purchase Venture's gas (169-70, 414-15). Distribution sought PSC approval to pass on to consumers the costs of the

proposed price escalator clause.[3] It enlisted the aid of Flint, which considered the price escalator "very important" and provided material to the PSC (1446-47).

Distribution offered producers other than Venture "interim agreements" which they could ratify or reject after the PSC acted (703-04). Venture was willing to sell its gas at the current, rather than escalated price. At a December 4, 1975 PSC meeting, curiously chaired by Distribution's Vice President, Bernard Kennedy ("Kennedy"), Giallombardo shouted down Venture's attorney when he attempted to explain its position (424). Kennedy thereupon ruled Venture's attorney out of order. In a post-meeting conversation, Kennedy told him that a purchase contract without the escalator was "not in the interest of some drillers . . . particularly Flint . . . ." (614).

By the spring of 1976, it was apparent that Distribution would not purchase Venture's gas. Venture disposed of its remaining leases, transferring some to another Waytena company, and commenced this action, alleging, *inter alia*, that Distribution and Flint had violated §1 of the Sherman Act, 15 U.S.C. §1. Jurisdiction of the District Court was based upon 15 U.S.C. §15 and 28 U.S.C. §§1331 and 1337.

B. *The Jury Verdict*

The jury deliberated for a full week following the eight-week trial, found that the defendants had violated §1 of the Sherman Act and the Donnelly Act,[4] and awarded Venture $500,000 in damages, before trebling.

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[3]The escalator clause would have tied local gas prices to interstate pipeline prices.

[4]N.Y. Gen. Bus. Law §340 (McKinney 1968).

C. *The District Court Decision*

Distribution and Flint moved for judgment n.o.v., or, in the alternative, for a new trial. The District Court wrote a 74-page opinion denying those motions and "squarely reject[ing]" the defendants' argument that the jury could not have found a conspiracy (App. A-10). Judge John T. Elfvin found that the jury was not required to accept the defendants' interest-motivated explanation of the contacts between Flint and Distribution (App. A-12).

The defendants' conduct was "consistent with the concerted action charged and . . . at the least very curious in the absence of such concert" (App. A-14). Such evidence, found the District Judge, demonstrated far more than mere contacts between the defendants. In sum, "[t]he record [was] such that the jury could have inferred the existence of a well-executed scheme to keep moving the pea one step ahead of Venture until the latter concluded that it would never win the game" (App. A-18).

The District Judge examined the reasons offered in justification of Distribution's refusal to purchase Venture's gas, and concluded that "there is substantial evidence for the jury to have rejected any or all of them as mere pretexts" (App. A-16). Having heard all the evidence, he observed that "[t]he action resolved itself into questions of credibility, the determination of which is perhaps a jury's greatest ability. Because of the importance herein of issues of credibility, I am extremely reluctant to upset the jury's decision. On the evidence presented I would not be justified in so doing" (App. A-22).

D. *The Decision of the Second Circuit*

The Second Circuit reversed and remanded for entry of judgment in favor of Distribution and Flint. It selected for discussion some, but not all, of the evidence and concluded that

it was insufficient to support the inference of concerted activity.

It inferred that "the entire Venture matter was not of great moment [to Distribution]," (App. B-11) despite the evidence that Fox handled Venture's application personally in a departure from established company practice. It discredited the evidence of Flint's payments to Fox and his uniquely close connections with Flint. It wrote Distribution's spacing policy, and particularly its application to Venture, out of the case simply because Flint did not participate in the formulation of the policy and objected to its implementation. The inference that resort to that policy was an act by Distribution in furtherance of the existing conspiracy received no mention.

The Second Circuit accepted the defendants' explanation of the Frey transactions. Likewise, it accepted Distribution's reliance on its PSC application as a justification for its refusal to commit to purchase Venture's gas, with no mention of the "interim agreements" offered to other producers. The pretextual nature of the defendants' explanations of their conduct was, in the eyes of the court, insufficient alone to support the inference of concerted activity, but the court failed to consider that evidence in light of the other evidence.

The Second Circuit began its analysis by noting that it could reverse only if there was " 'but one reasonable conclusion as to the proper judgment' . . . (Citing *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, ____ U.S. ____, 50 U.S.L.W. 3984 (May 28, 1982) (No. 81-2215)" (App. B-8). After reviewing the evidence, it concluded that "taken as a whole, the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy . . . ." (App. B-15). Nevertheless, the court reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

Certiorari should be granted to review the standard imposed by the Second Circuit in a recent line of cases, in conflict with the First and Third Circuits, which permits the Appellate Court to make a *de novo* determination of factual issues.

Venture respectfully urges this Court to review the decision of the Second Circuit, not only to ensure that that court applies the proper standard of review in appeals involving jury verdicts, but also to resolve the conflict among the circuits as to the scope of evidence subject to appellate review. In such appeals, the Second Circuit reviews *all* the evidence to determine whether there is substantial evidence to support the jury's findings, a practice that "comes dangerously close to weighing the evidence." 9 C. Wright and A. Miller *Federal Practice and Procedure* §2529 at 571 (West 1971). In effect, that standard permits the court to draw inferences which it deems proper, substituting its judgment for that of the jury.

The Second Circuit has accepted the testimony of interested witnesses on behalf of the parties seeking to overturn the verdict. It has drawn inferences based on such interested testimony, despite the fact that, unlike the jury or the District Judge who reviewed that verdict in the first instance, it could not observe the demeanor or assess the credibility of the witnesses.

This Court should review that practice for three reasons. First, the standard applied by the Second Circuit is a radical departure from established appellate practice, and ignores the directions of this Court concerning the deference due to determinations by triers of fact. Second, the Second Circuit's standard conflicts with the more limited review of the facts

undertaken by the First and Third Circuits. Third, that court's practice essentially denies the parties the right to trial by jury.

Each of these considerations goes to the core of the fact-finding function of the federal judicial system and affects all litigants. Review is warranted because the Second Circuit has departed from the accepted and usual practice in judicial proceedings, and its course will be righted only by the exercise of this Court's supervisory powers. In order to ensure compliance with the Seventh Amendment and that justice is administered fairly and consistently, this Court should review the decision below.

The facile reversal of the jury verdict following the lengthy trial in this case does not stand alone in the Second Circuit.[5] Citing *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) *cert. denied*, 102 S.Ct. 639 (1981), *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), petition for *cert. filed*, 51 U.S.L.W. ____ (U.S. August 16, 1982) (No. 82-277), it determined that the jury and District Judge Elfvin had erred in concluding that Distribution and Flint had conspired. The court summarized the evidence from this eight-week trial in five pages. Its brief decision contrasts sharply with the District Judge's 74-page

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[5] *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976) (The court reversed a jury verdict in the plaintiff's favor, following a four-week trial of the antitrust action, on the ground that there was insufficient evidence of concerted action); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978), *cert. denied* 439 U.S. 946 (1978) (The majority of the court sitting *en banc* credited the testimony of the defendant's officers in holding that the plaintiff's termination did not result from an unlawful conspiracy. The court affirmed a directed verdict for the defendant after retrial on the ground that the plaintiff had failed to prove a conspiracy. *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981)); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, ____ U.S. ____, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215) ("*Moore*") (The court, relying in part upon disputed and inconsistent testimony of the defendant's witnesses, reversed the denial of the defendant's motion for

Footnote continued on next page—

analysis of the evidence following his first-hand observation of the testimony and demeanor of the witnesses.

The Second Circuit simply accepted much of the defendants' testimony. It concluded that the relationship between Fox and Flint could not support an inference of conspiracy. It found those contacts "unremarkable", ignoring the fact that Fox's consistent and frequent contacts with Flint continued well after his move to Houston, as did Flint's payments to him. District Judge Elfvin, on the other hand, held that the jury could reasonably have inferred that Distribution and Flint acted in concert. The evidence supplied a motive for each to do so, demonstrating "far more than mere contacts . . ." (App. A-14). The defendants' actions not only were "consistent with the concerted action charged," but also "at the very least curious in the absence of such concert" (App. A-14).

The Second Circuit blandly recounted the monetary benefits earned by Fox from his dealings with Flint. It did not explain why the jury could draw no inference from the fact that Priority had but one client — Flint. The $17,000 "token of appreciation" appeared in its decision as a mere brokerage commission, with no mention of the damning admission of Flint's principal. The jury and the District Judge recognized the Fox-Priority-Flint relationship for what it was. The defendants dealt at less than arms length, and Fox and Distribution "could be expected to be quite receptive to a cry that Flint was being injured by a competitor" (App. A-6).

—Footnote continued from preceding page

judgment n.o.v.); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, (2d Cir. 1982), petition for *cert. filed*, ___ U.S. ___, 51 U.S.L.W. ___ (U.S. August 1982) (No. 82-277) ("*Schwimmer*") (The court again reviewed all the evidence and accepted the defendant's explanation of the plaintiff's termination in holding the proof of conspiracy was insufficient. It even determined an issue of credibility, refusing to credit the testimony, favorable to plaintiff's position, of one of the defendant's executives, because it was not corroborated by other defense witnesses.); *Unijax, Inc. v. Champion International, Inc.*, ___ F.2d ___, 1982-2 Trade Cases ¶64,814 (2d Cir. 1982) (The court, in affirming judgment for the defendant n.o.v., reviewed the evidence which it deemed relevant, and concluded that the plaintiff had failed to prove a tying arrangement in violation of §1 of the Sherman Act.).

The petitions filed in *Moore* and *Schwimmer* raise many of the same issues presented here.

The Second Circuit accepted Fox's and Giallombardo's explanation of their conversations concerning Venture — that they were limited to Distribution's existing obligation to purchase Flint's gas and the closeness of Venture's well. The District Judge did not require the jury "to accept [the defendants'] interest-motivated testimony as to the limits of their conversation." (App. A-12).

The defendants' explanation of Distribution's spacing policy as a purported justification for the refusal to buy Venture's gas found a receptive ear in the Second Circuit. The court ignored the inconsistent testimony of Distribution's officers concerning its formulation and the evidence that on November 19, 1975 Distribution assured Venture that the policy would not apply to the Boyd and Grant wells. The District Judge recognized "[t]he spacing policy was rushed into place, and on a retroactive basis, within three days of Giallombardo's complaint and little more than a week after Distribution's assurance to [Venture] that it was weeks away from implementation" (App. A-14).

The circumstances of the Frey lease are dismissed by the Second Circuit's acceptance of the defendants' testimony of their purported efforts to reach an "accommodation." The District Judge found that the jury "could easily . . . construe [that explanation] as a mere sham" (App. A-16).

The conflicting results reached by the Second Circuit and the District Judge result from the different standards applied by each in reviewing the verdict. The Second Circuit reviewed all the evidence, and, inevitably, drew its own inferences, which carried the day. The District Judge was more circumspect, guided by the principle that "the non-moving party must be given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached. (*See e.g.*,

Bigelow v. Agway, Inc., 506 F.2d 551, 554 (2d Cir. 1974)"[6] (App. A-3). His decision recognizes the deference to be given the trier of fact. The Second Circuit's standard, in effect, makes it the fact finder. That standard should be reviewed.

A. *The Second Circuit's Review Of Jury Verdicts Conflicts With The Principles Established By This Court Affirming The Role Of Juries And District Courts In Determining Questions Of Fact.*

In the past year, this Court has reaffirmed the deference due factual findings by the District Court in bench trials. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, 72 L. Ed.2d 606 (1982) (*"Inwood"*) and *Pullman-Standard, a Division of Pullman, Inc. v. Swint*, ____ U.S. ____, 72 L. Ed.2d 66 (1982) (*"Pullman"*), enunciate the principle that those issues are best resolved at the trial level and such determinations should not be overturned lightly on appeal. In *Inwood*, this Court noted "the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. (Citation omitted)." *Id.* at , 72 L. Ed.2d at 616.

This Court criticized the Second Circuit's reversal:

> By rejecting the District Court's finding simply because it would have given more weight to the evidence of mislabelling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is a special province of the trier of fact.

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[6] As will be discussed below, the same conflict over the applicable scope of review exists among the circuits. Interestingly, Judge Elfvin derived his standard from the Second Circuit's own decision in *Bigelow v. Agway, Inc.*, *supra*, a decision apparently abandoned by that court.

Id. at , 72 L. Ed.2d at 616-17,[7] and elaborated on that court's error.

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 399 U.S. 485, 495 (1950).

Id. at , 72 L. Ed.2d at 618. The inferences drawn by the District Court were not unreasonable, and the Second Circuit cited no evidence to support its conclusion that they were. *Id.* at , n. 16, 17, 72 L. Ed.2d at 616-17, n. 16, 17.

Pullman reversed the Fifth Circuit's conclusion which "strongly suggest[ed] that the outcome was a product of the court's independent consideration of the totality of the circumstances it found in the record." *Id.* , 72 L. Ed.2d at 81. This Court rejected such a *de novo* review of the evidence.

Just as the Second Circuit substituted its judgment for that of the trial court in *Inwood*, so it substituted its judgment for that of the jury *and* the District Judge in the present case. If a trial judge sitting alone is entitled to deference, *a fortiori* the decision of a district judge denying a motion for judgment n.o.v., as well as the related verdict, are entitled to the same deference. Both the trial judge and the jury have the advantage of hearing all the evidence and observing the character and demeanor of the witnesses. They are in a far better position to determine the weight to be given to the evidence than is an appellate court, reviewing a lifeless printed record.

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[7]The District Judge in the instant case was appropriately persuaded that juries are best qualified to determine issues of credibility. *See supra* at 8. This comports with the principle later enunciated in *Inwood* and *Pullman*, but rejected by the Second Circuit.

Deference to triers of fact is not limited to bench trials. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (*"Continental"*), this Court considered the standard to resolve conflicting inferences from the evidence before the jury:

> Undoubtedly, all of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which "weighs the contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts." *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35.

Id. at 700-701. It rejected the appellate court's substitution of its own judgment:

> The evidence relied upon by the court can just as reasonably be read in a manner favorable to Continental and it appears that the court may have misapprehended significant parts of the record. In any event, the interpretation and significance of this evidence were for the jury.

Id. at 701. Likewise, the evidence in the present case just as reasonably supports inferences in Venture's favor, and the Second Circuit misapprehended significant parts of the record.[8]

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[8]For example, the Second Circuit relied on Flint's purported opposition to Distribution's spacing policy to support its conclusion that there was no conspiracy. Venture claimed, however, that Distribution's implementation of the policy was an act in furtherance of the conspiracy, not requiring the participation or sanction of Flint. *See Beltz Travel Service, Inc. v. International Air Transport Association*, 620 F.2d 1360 (9th Cir. 1980). Also, the Second Circuit concluded that the $17,000 "token of appreciation" paid to Fox by Flint could not support an inference of conspiracy because it predated Venture's formation. That conclusion misapprehends Venture's claim that Distribution and Flint conspired to keep aggressive competitors in general out of the market, and merely directed their efforts at Venture as one object of the conspiracy.

The Second Circuit's decision is squarely at odds with the teachings of *Continental Ore, Inwood* and *Pullman*. That conflict is made manifest by its reversal, despite the conclusion that "taken as a whole, the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy . . . ." (App. B-15). The directions from this Court dictate but one result from that conclusion — an affirmance of the District Court judgment. This Court exercised its supervisory powers to correct the erroneous standard applied by the Second Circuit in *Inwood*. It should do no less here.

B. *The Second Circuit's Review Of* All *Evidence To Determine Whether Substantial Evidence Supports A Jury Verdict Conflicts With Decisions Of The First and Third Circuits.*

The Courts of Appeals, guided by the precedents of this Court,[9] are in general agreement that they may reverse a jury verdict, or a denial of a motion for judgment n.o.v., only if fair-minded men could reach but one conclusion from the evidence. A conflict exists, however, as to the evidence an appellate court may review in applying that broad standard.

The First Circuit has held that, in reviewing a directed verdict for the defendant at the close of the evidence,[10] it should consider only the non-movant's evidence and uncontradicted and unimpeached evidence introduced by the movant. *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961). That court has expanded its "field of vision" to include documentary evidence, the existence of which is undisputed. *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981). The Court of Appeals for the Third Circuit has adopted the same standard. *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33, (3d Cir. 1980); *Fireman's Fund Insurance Co. v. Videfreeze Corp.*,

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[9] *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944); *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943); and *Gunning v. Cooley*, 281 U.S. 90 (1930).

[10] The same standard of review applies to directed verdicts and motions for judgment n.o.v. *Yezzie v. Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977).

540 F.2d 1171, 1178 (3d Cir. 1976) (holding that inferences from contradicted testimony must be left to the jury).

The Fifth Circuit has broadened its review to consider *all* the evidence, not merely that supporting the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969). The Court of Appeals for the District of Columbia applies the same doctrine. *Boutros v. Riggs National Bank, D.C.*, 655 F.2d 1257 (D.C. Cir. 1981). *See also Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981).

The conflict is real, not a question of semantics. 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2529 (1971). That commentator argues that a rule permitting consideration of all the evidence is too broad, urging instead that only the movant's uncontradicted evidence be included with the non-movant's evidence in the appellate court review. *Id.*[11]

The Second Circuit has now joined those circuits permitting review of all the evidence, although that was not always the case. In *Bigelow v. Agway Inc.*, 506 F.2d 551 (2d Cir. 1974), the court reviewed only the non-movant's evidence and the movant's uncontradicted and unimpeached evidence in reversing a directed verdict for the defendants. In *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 444 F.2d 372 (2d Cir. 1971), the court held that the jury need not accept testimony merely because it was uncontradicted and unimpeached. The jury was to determine credibility, and was not bound to accept the testimony of the plaintiff's damages expert. "[W]hen it comes to finding facts from the evidence, juries enjoy a near-total independence." *Id.* at 378.[12]

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[11] Other commentators have also criticized the broader view. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-53 (1971); Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053, 1062-63 (1964); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961).

[12] *See also dicta* in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

Apparently, that is no longer true. In *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), the court examined the entire record, rejected certain evidence favoring the plaintiff, and concluded that there was insufficient evidence to support the jury verdict. This practice has now become the rule in the Second Circuit, and the court substitutes its judgment for that of the trier of fact.

Definition of the proper role of the fact finder is crucial. The deference which this Court shows to the trier of fact is clear. The conflict concerning the appropriate scope of review of verdicts threatens the traditional respect for those factual determinations. Certiorari is required to resolve the conflict and define the scope of appellate review, consistent with the Seventh Amendment.[13]

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[13]The Seventh Amendment to the United States Constitution prohibits the Courts of Appeals and this Court from redetermining facts found by the jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). In the past, the Second Circuit at least has paid lipservice to the strictures thereby imposed on it. *See Michelman v. Clark-Schweble Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976). The issue of conspiracy in this case is a factual one. The District Judge's conclusion in this regard bears reiteration. "The action resolved itself into questions of credibility, the determination of which is perhaps a jury's greatest ability" (App. A-22).

Venture presented its evidence and arguments to the jury. The jury heard the testimony and observed the demeanor of all the witnesses. It deliberated for a full week. The District Judge recognized this in his opinion. Nevertheless, the Second Circuit conducted its own review of the evidence inferring that there was no conspiracy. In so doing, it effectively denied Venture its right to trial by jury. Its conclusion that "taken as a whole the evidence pointed with at least as much force toward unilateral actions by Distribution as toward conspiracy . . ." (App. B-15) demonstrates the harsh result of that denial.

II

This Court should review the standard imposed by the Second Circuit which limits the nature of the evidence deemed sufficient to demonstrate concerted action under Section 1 of the Sherman Act.

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, (1962) held that in cases involving alleged concerted action in violation of §1 of the Sherman Act:

> Plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each ". . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (C.A. 6th Cir.).

The Second Circuit ignored this standard, separately reviewing selected elements of the evidence. In each instance, the court found the evidence standing alone insufficient to support the inference of concerted action. Despite its conclusion that the evidence taken as a whole supported conflicting inferences, it viewed the parts rather than the whole in concluding that the jury had erred.

The court below has formulated a new doctrine. Although recognizing that conspiracies by their nature must be proved inferentially and largely from circumstantial evidence, the court in *Michelman v. Clark-Schwebel Fiber Glass Corp.*, *supra*, perceived a lack of evidence of the defendants' overt commitment to a common goal, and rejected a jury finding of conspiracy. *See also Fuchs Sugar & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert denied*, 444 U.S. 917

(1979). In more recent decisions, the court appears to require that the plaintiff present direct evidence of a contract or agreement. In *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980) *cert. denied*, 102 S.Ct. 639 (1981), the court held that, in the absence of direct testimony of agreement, the circumstantial evidence showed only "close relations" between the defendants, which it deemed insufficient to support the inference of conspiracy. In *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982) petition for *cert. filed*, ___ U.S. ___, 51 U.S.L.W. (U.S. August 16, 1982) (No. 82-277), it found that ample proof of dealer complaints and contacts among defendants in which the plaintiff's competitive practices were discussed, together with responsive action by the manufacturers, insufficient to support the inference of conspiracy. Likewise, similar evidence in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981) petition for *cert. filed*, ___ U.S. ___, 50 U.S.L.W. 3984 (May 28, 1982) (No. 81-2215), was found insufficient.

In the instant case, the court determined that, as a matter of law, there was no evidence of concerted activity. This despite a record replete with evidence of the relations between Distribution and Flint, favored treatment of Flint, payments from Flint to one of Distribution's officers, complaints from Flint about Venture, the curious circumstances of the Frey transactions, a selectively and retroactively imposed spacing policy, and *post hoc* rationalizations of otherwise commercially irrational business conduct. Not surprisingly, there was no testimony from the defendants that they had agreed to keep Venture out of the market. Absent such evidence, the Second Circuit cannot bring itself to find a conspiracy or permit a jury to do so.

The holdings of the Second Circuit conflict with recent decisions in the Seventh and Eighth Circuits. In *Spray-Rite Service Corp. v. Monsanto Co.*, ___ F.2d ___, 1982-2 Trade Cases ¶64,808 (7th Cir. 1982), the court held that evidence of dealer complaints followed by responsive action by a manufacturer was sufficient to support an inference of con-

spiracy. The Eighth Circuit applied the same standard in *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982).

Competitors are unlikely to enter into explicit agreements to suppress competition. More likely, they will act covertly and the conspiracy can be deciphered only through an analysis of the totality of their actions, including their effect. If the standard applied by the Second Circuit is permitted to remain, it is unlikely that any plaintiff will be able to demonstrate concerted activity. Section 1 of the Sherman Act will be effectively emasculated. Certiorari is required to enable review by this Court of this apparent departure from the traditional standard of proof required to establish concerted action within the meaning of §1 of the Sherman Act.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this petition for a writ of certiorari be granted to review the judgment and opinion of the Second Circuit because that decision is in conflict with the decisions of this Court and Courts of Appeals in other circuits and raises significant and recurring questions of federal law.

Dated: Rochester, New York
August 30, 1982

Respectfully submitted,

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APPENDIX A

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

VENTURE TECHNOLOGY, INC.,

Plaintiff,

-vs-

NATIONAL FUEL GAS COMPANY (New York, N.Y.);

NATIONAL FUEL GAS DISTRIBUTION CORPORATION (Buffalo, N.Y.);

FLINT OIL & GAS COMPANY, INC. (Buffalo, N.Y.),

Defendants.

CIV-76-226

Now before me in this private civil antitrust suit, after trial and a jury verdict for plaintiff against all defendants in the amount of $500,000, are defendants' joint motions for a directed verdict (argument and decision on which was reserved until after return of the verdict), for judgment n.o.v. and for a new trial, and plaintiff's motion for attorney's fees and costs. For reasons to be explained herein, I have concluded that the evidence supporting the verdict is sufficient such that a directed verdict may not be entered. Additionally, I have concluded that the jury's verdict is not manifestly unjust or unreasonable or against the great weight of the credible evidence, and that, although this action raises a number of substantial unsettled questions of antitrust law, after careful review I remain convinced that the jury was correctly instructed. For these reasons, defendants' motions must generally be denied. Plaintiff's motion for attorney's fees must be denied without prejudice as premature.

The remainder of this decision consists of five sections. The first will summarize the evidence relating to the charged conspiracy and its alleged effect on plaintiff's business. The second section will deal with several additional arguments proffered by defendants: that the evidence presented was insufficient as a matter of law to support federal jurisdiction, that plaintiff has not established any damages and, finally, that plaintiff is estopped from seeking such damages. The third section will deal with defendants' arguments that a new trial must be granted because of erroneous instructions to the jury and errors in the admission of evidence. The fourth section will discuss plaintiff's motion for attorney's fees and costs of suit. The fifth comprises my Order herein.

I. *Evidence Relating to Conspiracy and Plaintiff's Business*

A. Introduction

This summarization is not intended to be a comprehensive review of all of the evidence but only of what is necessary and useful to fairly present the parties' positions and to explain my decision herein. Where the evidence is in conflict, the summarization sets forth that evidence reasonably supporting plaintiff's position.

On deciding the defendants' motions for summary judgment, judgment n.o.v. and for a new trial, I am required to view the evidence from two different perspectives. On a motion for judgment n.o.v., I may not substitute my own judgment for that of the jury. A verdict may not, however, survive simply because it is supported by a "mere scintilla" of evidence standing in opposition to overwhelming evidence not supporting the verdict. *See, e.g.*, 5A Moore's Federal Practice ¶50.02[1], at page 50-31 & n.22. On the other hand, if there is evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach conclusions

different from those espoused by movants, the motions must be denied and the jury's verdict allowed to stand. The non-moving party must be given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached. *See, e.g., Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974). To reject such an inference as unreasonable, it must be outside the range of reasonable probability, or "at war with undisputed facts." *O'Connor* v. *Pennsylvania Railroad Company*, 308 F.2d 911, 915 (2d Cir. 1962). A specific application of this general standard requires determination whether the inference of conspiracy which the jury necessarily drew in granting a verdict to plaintiff under section 1 of the Sherman Act and New York's Donnelly Act are within the range of reasonable probability and not rebutted by overwhelming evidence to the contrary. *See, e.g., Comfort Trane Air Conditioning* v. *Trane Co.*, 592 F.2d 1373, 1384 (5th Cir. 1979); *Scott Medical Sup. Co., Inc.* v. *Bedsole Surgical Sup Inc.*, 488 F.2d 934 (5th Cir. 1974).

The standards for settting the jury's verdict aside and ordering a new trial on grounds of evidentiary inadequacy are somewhat less stringent. As defendants correctly observe, I may order a new trial even if there technically is substantial evidence to support the verdict. However, I may not do so simply because I disagree with the jury's conclusion. The United States Court of Appeals for the Second Circuit has explained that I must view the verdict in the overall setting of the trial, consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. My duty is essentially to see that there is no miscarriage of justice. *Bevevino* v. *Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978).

B. Parties and Background Material

Defendant National Fuel Gas Company ("National") is a registered public utility holding company. Defendant National Fuel Gas Distribution Corp. ("Distribution") is a wholly-owned subsidiary of National Fuel Gas Company and a public utility licensed to distribute natural gas to consumers in large areas of western New York and western Pennsylvania and a small area of northeastern Ohio. Defendant Flint Oil & Gas Corporation ("Flint") is a New York corporation and an independent producer of natural gas which owns more than two hundred natural gas wells in western New York. Plaintiff Venture Technology, Inc. ("Venture") is a New York corporation and a former producer of natural gas.

William L. Waytena, Venture's President and sole financial backer and a western New York businessman and investor, and National Fuel Gas Supply Corp. ("Supply") figure prominently in the case but are not parties thereto. Supply's primary function was to purchase and feed into the distribution pipeline system operated by Distribution natural gas delivered by interstate pipelines originating in the southwestern United States and by certain industrial suppliers of artificial "natural gas" produced either from petroleum naptha or from coke. Distribution and Supply are direct corporate successors in interest to Iroquois Gas Company ("Iroquois") which was acquired by National Fuel Gas Company in the early 1970's.

The stage of this action was set in the late 1960's. The rock formations underlying western New York contain natural gas in amounts sufficient to supply a substantial proportion of such area's demand for natural gas. Iroquois, during the 1960's, negotiated gas leases from the owners of some hundreds of thousands of acres of land in western New York. These leases gave Iroquois the right to locate wells on the lands and to extract the natural gas therefrom in return for a royalty payment of a percentage of sales to the lessors. In 1972, however,

Iroquois determined that it would be preferable to induce independent companies to raise the necessary capital, drill the wells and produce the gas, and then simply to buy the resulting output. Iroquois therefore instituted a "purchase program" whereunder it offered to buy gas, at published rates, from any person willing to comply with certain requirements comprising metering, heat content, safety and environmental protection. To allow exploration and drilling on the land already covered by its acquired gas leases, Iroquois began to assign its gas leases (or, as known in the trade, "farm [them] out") to independent gas production companies. As consideration for the assignments, Iroquois required payment of a royalty to it, based on a percentage of total revenue, much like that retained by the owner of the fee simple. After Iroquois had been acquired by National Fuel Gas Company, the gas leases were held by Supply but the purchase program was administered by Distribution, in a fashion similar to Iroquois's. Not all such leases were farmed out, however. As of 1975, Supply still had a very large amount of land still under leases, some of which territory constituted "areas of [National Fuel Gas Company] interest" where, either because Supply or Distribution desired to drill these areas themselves (in a partial reversal of the 1972 Iroquois policy) or to encourage Flint or Paragon Resources, Inc. ("Paragon") to drill these areas, other independent drillers were discouraged from operating.

Flint commenced drilling for natural gas in western New York in about 1971; by 1975 it had drilled more than 200 wells, all but four of them in New York, and was at that time one of two very large sellers of natural gas to Distribution. Flint had obtained a number of its well sites through "farmouts" directly, or through various *mesne* conveyances, from Iroquois or Supply. Additionally, there was a great deal of contact between officers of Distribution and Flint's officers, as would be expected from two corporations having such extensive contractual and business connections. As one example, John Fox,

the manager of Distribution's gas purchase program, attended at least some of the meetings held by Flint to attract investors, to answer any questions the investors might have about the purchase program. No proof was offered that similar services were offered to other producers. There was substantial evidence that Flint, by reason of its early entry into the field, its large size and its success, was in effect if not explicitly a chosen instrument of Distribution's efforts to obtain local natural gas supplies.

The relationship between the companies was furthered by substantial financial ties between Flint and Distribution's officers. Most notably, from 1969 to 1975 John Fox was the owner, with his then-wife, of a real estate agency called Priority Acquisitions, Inc. which, between 1969 and 1973, acquired several pieces of property for Flint and earned substantial commissions from these purchases, which commissions comprised much or all of Priority Acquisitions, Inc.'s income during this period. The senior management of Distribution was aware of and gave at least tacit approval to this relationship. Defendants now argue that this relationship does not constitute evidence of any conspiracy against plaintiff. This is technically true; however, this relationship could have been taken by the jury as evidence of an extremely cordial and not-at-arms-length business relationship between Flint and Distribution in which Distribution, especially in the person of Fox, could be expected to be quite receptive to a cry that Flint was being injured by a competitor.

C. The Formation of Venture

Venture was formed by Waytena to engage in the oil and gas business in western New York. Just previous to this venturing, Waytena had been an investor in several limited partnerships for drilling gas wells in which Flint was the general partner. Waytena had become convinced that Flint was charging the

limited partners an undue amount for various services, especially legal services; he characterized the situation as a "rip-off." In September 1975 he incorporated Venture. Waytena was sole incorporator; however, in the summer of 1975, even prior to Venture's incorporation, he associated two additional persons in the business, Thomas H. O'Neill and Donald M. Parano. It was conceived that each would own one-third of the business; Waytena was to provide the capital and O'Neill and Panaro were to provide services to the company. O'Neill had had significant experience in the western New York oil and gas business through his participation in Ginell Company, an oil and gas partnership formed about 1970 with Salvatore Giallombardo, Esq., later President of Flint, and O'Neill's later work in the field as a consultant. Panaro had been a limited partner in Ginell Company and was somewhat familiar with the business. Waytena was only slightly familiar with the oil and gas business but was an experienced and successful entrepreneur and investor. Both Panaro and O'Neill served without salaries during the latter part of 1975 and the early part of 1976. No stock in Venture was, in fact, ever distributed to them; the principals did not "get around" to the distribution of shares until early 1976 at which time both O'Neill and Panaro were rapidly losing interest in Venture as a consequence of its apparent failure. Waytena at that time purchased their interests for $5,000 and acquired all the shares himself. Venture was financially operated as though it were Waytena's sole proprietorship.

At the time of his association with O'Neill and Panaro, Waytena planned to have Venture drill some ten wells in 1975; this plan was soon shelved in favor of a concept wherein Venture would drill three (or possibly five) successful wells before the end of 1975, then use this demonstrated success to attract outside investors to what was hoped would be 24-well to 30-well annual drilling programs to be commenced in 1976. Waytena and his associates considered it of great importance to

have these wells in place and producing income promptly so as to demonstrate to potential investors that Venture, which was admittedly a company whose principals had only limited experience in the gas exploration business, nonetheless would be an investment no more risky than any other company engaged in that inherently speculative business.

By November of 1975 Venture had acquired gas leases on some ten to fifteen parcels and had obtained New York State Department of Environmental Conservation drilling permits for wells on five of these leased sites, known at trial as the Boyd, Grant, Frey, Bennett and Nickerson sites (after the names of the respective lessors). It was decided to move most expeditiously on the first three of these parcels. After inquiring of numerous entities in the oil and gas drilling business, Venture engaged as driller the C & R Oil & Gas Company ("C & R"), controlled by one Charles Thropp. C & R agreed in writing to drill the three wells for a complete (or "turnkey") price of $55,000 per well; this supposedly fixed price was subject to an oral side agreement that such price would be subject to adjustment up or down to reflect changes in prices of supplies. Venture, for example, was charged only some $48,000 for the drilling of the Boyd well. C & R contracted with companies headquartered outside of New York to provide merchandise (steel pipe, compressed gases and specialized natural gas well equipment and services) costing some $33,000. None of Venture's officers approached Distribution to obtain or discuss a purchase contract before Venture commenced drilling; they were aware of the purchase program and simply assumed that any gas produced in conformity therewith at the time the well was drilled would be purchased by Distribution. Approximately November 1, 1975, C & R began drilling the well on the Boyd property. It was completed approximately November 19th of that year and produced gas. The well on the Grant property was commenced somewhat later, was interrupted, and was completed in 1976. The Frey well was staked

out and certain additional steps were taken in late November, 1975, but no hole was actually bored by or on behalf of Venture.

D. The Allegations of Conspiracy

It is upon this chronological stage that the factual dispute between plaintiff and defendants becomes most clearly focused. Plaintiff contends, and the jury concluded, that Flint and officers of Distribution had agreed and conspired that Distribution would refuse to purchase plaintiff's gas and thereby frustrate plaintiff's planned entry into the natural gas business in competition with Flint. Defendants argue that plaintiff's evidence, even taken in the light most strongly supporting plaintiff's case, does not show the outline or essential features of the alleged conspiracy, and that on the undisputed facts herein plaintiff's theories of conspiracy are incredible. Defendants further contend that the overwhelming and uncontradicted evidence in the case shows (1) that, while Flint's President did call Distribution's Fox to complain about certain of plaintiff's drilling activities, there was no agreement or concerted action to injure plaintiff, (2) that, while defendant Distribution did impose in November 1975 certain additional requirements as preconditions to gas purchases, such requirements were not intended to frustrate the business of plaintiff but, rather, to stimulate gas production while conserving and optimally exploiting the supply of natural gas and (3) that National applied this program fairly and made substantial efforts to assist plaintiff in adjusting to it and, in fact, agreed to waive the requirements and to purchase the gas from several of plaintiff's wells that did not conform to the policy. Defendants further contend that this same body of evidence establishes conclusively that plaintiff either terminated its active operations voluntarily and for purposes of fomenting litigation or as a result of its own incompetence and lack of business experience.

Defendants argue strongly that plaintiff alleged only some formless conspiracy without any definite objective. They argue quite correctly that they cannot be found to have participated in a conspiracy without some specification of the essential elements of the unlawful agreement. It is not, as a matter of law, possible to conspire in a vacuum; a conspiracy must have a purpose. While plaintiff could have been more specific in its charges, the jury was adequately apprised of the nature of the charges through the statements of counsel and the testimony of plaintiff's witnesses. Plaintiff charged explicitly that defendants agreed to refuse to allow it to enter the western New York gas production business in a substantial manner and that such scheme was implemented by Distribution's institution and discriminatory administration of a "spacing policy" amendment to its gas purchase program. If proven, such a conspiracy would, for reasons that will be discussed in sections II and III of this Order, be unlawful under the Sherman Act. Plaintiff sufficiently charged the elements of a conspiracy.

Second, defendants contend, as enumerated above, that the record herein, when considered as a whole, wholly fails to support the jury's finding of conspiracy. This contention must be squarely rejected. The spacing policy, a restrictive addendum to Distribution's program for purchasing gas, is central to this litigation. Unless waived, it specified that Distribution would not purchase gas from wells located on leases of less than 40 acres, located closer than 1,380 feet from another well, or located less than other specified numbers of feet from dwellings, property lines and roads. This policy had been, according to defendants' witnesses, under study and review beginning in early 1974 and had been applied prior to November 1975 when Distribution had refused to purchase the gas from a well located on a two-acre McElwain tract. Panaro was told November 12, 1975 that Distribution was developing a spacing policy of some kind but that it would not affect Venture's initial wells and would not be finalized for several

weeks. As of November 19, 1975 it supposedly was still in draft form. However, on November 21, 1975, plaitiff received a typewritten text of such policy, dated and applicable retroactively to November 1st. This policy is similar in many respects to the regulations of New York's Department of Environmental Conservation pertaining to gas wells, but contains two very significant distinctions. First, the state regulations apply only to "new" gas fields — generally, fields the exploitation of which commenced subsequent to the adoption of the regulations — and therefore did not apply to the area where plaintiff had located its first five leases, which area had been previously drilled. Distribution's spacing policy applied to all fields, old and new. New York had, after substantial political controversy, expressly declined to regulate such "old" natural gas fields, such as those in Chautauqua County. Second, New York's regulations contain only spacing requirements; they contain no minimum acreage requirements. Distribution's regulations, as noted above, require a minimum lease of 40 acres. This spacing policy was the subject of considerable testimony by the officers involved in its preparation and promulgation as well as from petroleum engineers and geologists. The well spacing requirement was described by these persons as having been imposed to prevent waste of natural gas through depletion of the natural subterranean pressure needed to drive it to the surface, and also to protect the financial expectations of a driller by preventing another or others from drilling into the same pool of gas. There was testimony from a geologist employed by another National Fuel Gas Company subsidiary that the acreage limit was substantially less necessary to accomplish these purposes than the spacing requirements themselves. The 40-acre minimum lease requirement was, however, described by Distribution's officers as necessary to protect a landowner from a draining of the gas reserves under his land by a well located on an adjoining small property. There was substantial testimony supporting the logic of Distribution's

intervening to prevent loss of the natural gas resources upon which it depends in part to serve its customers and to reduce the expenses of its suppliers, but very little justification for its decision to defend one landowner or lessee from another's operations.

The contacts between the parties during the crucial period of November and December 1975 were as follows:

There is no dispute that on or about November 18, 1975 Flint's President called Distribution's Fox in a state of considerable agitation about Venture's drilling operations. These two individuals testified that Giallombardo had been concerned only that plaintiff's wells were located too close to Flint's and also had insisted that Distribution buy all the gas Flint could produce before Distribution contracted to buy form Venture; however, the jury was not obliged to accept their interest-motivated testimony as to the limits of their conversation.

On November 19, 1975, plaintiff's officers met with Distribution's officers Steadman and Graham. Graham later described himself as a subordinate of Fox and stated that Fox personally had made all decisions relating to Venture. Steadman indicated that Distribution had been implementing its spacing policy in its then embryo form, but that Distribution nevertheless would have purchased the gas from Venture's three wells. It was mentioned that the pipelines in the area were outdated and inadequate. It was also stated that the area where Venture wanted to drill was an "area of interest" of National Fuel Gas Company wherein the latter wanted to encourage Flint and Paragon to produce gas. Steadman had tried to interest Waytena in drilling in or near Arcade (N.Y.) where the pipelines then were more adequate and which was not a National Fuel Gas Company "area of interest." Waytena had not been interested. It was not then said that the pipelines in the area where plaintiff's leases were located would prevent the purchase of plaintiff's gas; moreover, it was said that

Distribution was constantly updating and improving its pipelines. Graham did, according to Waytena, state that the price of gas would have to be set after certain Public Service Commission proceedings, whereupon Waytena had stated that he didn't need a price escalator clause (the allowability of which was the subject of such proceedings) in the contract. The meeting had ended, according to Waytena, with an understanding that Venture's gas would be purchased.

Two days later plaintiff received the typewritten copy of Distribution's spacing policy and a request that Venture supply certain information about the relevant leaseholds. Both the Boyd and Grant leaseholds consisted of somewhat less than 40 acres, although the wells thereon appeared to comply with the distance spacing requirements of the policy. Venture was informed at a subsequent meeting on December 3, 1975 that gas from the Boyd and Grant parcels would not be purchased because neither met the spacing policy. Graham had said at that meeting that Venture was free to drill on the Frey tract. However, some two days later Venture was informed by Fox that Venture's proposed Frey well was too close to a *proposed* Flint well on an adjoining tract from which Distribution was supposedly committed to purchase the gas. On December 17, 1975, Distribution informed Venture that it was going to request Flint to stop its drilling activities early for the Christmas holidays so that an agreement might be reached between Flint and Venture to move this proposed Flint well, so that Venture's well could comply with the spacing policy.

On December 4, 1975, Venture's officers attended a Public Service Commission hearing in Buffalo whereat Distribution, with the assistance of Flint and a number of other natural gas producers, was responding to a July 1975 order requiring Distribution to justify the price escalation clause employed by it in its gas purchase contracts. There was evidence that William Lerner, Esq., Venture's attorney, had, at the hearing, begun to testify that the clause was not necessary but was "shouted down" by Giallombardo.

Defendants argue that there was not sufficient evidence of conspiracy and was overwhelming evidence that the refusals by National Fuel Gas Company to purchase Venture's gas were wholly the product of independent business judgment. This contention does not carry the day. The evidence was sufficient to support an inference of the existence of a conspiracy to prevent plaintiff from assembling the initial successful drilling program needed for it to attract investors and enter the gas drilling business on a large-scale, aggressive basis. The spacing policy was rushed into place, and on a retroactive basis, within three days of Giallombardo's complaint and little more than a week after Distribution's assurance to Panaro that it was weeks away from implementation. Fox was specifically and personally in charge of decisions regarding Venture, an apparent deviation from normal company practice. It may be inferred that Fox countermanded Graham's tentative assurances on November 19th that gas from the three wells would be purchased, and it seems clear that he countermanded Graham's assurance on December 3rd that Distribution would buy Venture's gas from the Frey well. Later in the month of December, when the owner of the Frey leasehold telephoned Distribution to inquire about other drillers who might be able to drill for gas on his property, Fox clearly mentioned Flint (whether as only one of a number of names is a matter of dispute) and, when Flint did drill a well on the Frey property, its output was purchased by Distribution although its spacing relative to the other Flint well was seemingly the same and thus would have the same effects on subterranean pressure. Additionally, Distribution was during this period in the midst of a severe natural gas shortage and was declining to supply some customers and urging others to reduce their purchases of Distribution's sole product. In sum, the record reflects a number of instances of conduct which are consistent with the concerted action charged and which are at the least very curious in the absence of such concert. This constitutes evidence of far more than mere contacts between the companies.

Defendants argue that National had no motive to conspire. The jury could have found that Fox was either supplying the consideration for what plaintiff characterizes as a "payoff" from Flint to Fox through Priority Acquisitions, Inc., or was acting in hope of future largesse. Additionally, National had a motive, as a corporate entity, to prevent undue competition inasmuch as it maintained (via Supply) its own leases in the area of plaintiff's drilling and, even more important, indirectly received royalties from Flint on its farmouts through Amoco Production Company, which royalties are based on the dollar volume of sales and would be directly increased by actions raising or maintaining the price of natural gas.

Defendants also place much stress on the attempt by Distribution to persuade Flint to cease work December 17, 1975 so that some arrangement could be worked out on the Frey property, an offer by Distribution in April 1976 to purchase gas from the Boyd and Grant wells, the offer earlier in 1976 to purchase gas from the Nickerson lease then held by Gas Production Associates (another Waytena enterprise), the decision at about this time to waive the spacing requirements to allow drilling on the Bennett lease (by then transferred to Clearwater Systems, Inc., yet another Waytena enterprise), and Flint's vocal opposition to the spacing policy and its receipt of only about ten waivers of such spacing requirements, although some forty of its drilling sites were adversely affected by the policy.

Defendants argue that these acts show conclusively that Distribution's refusal to buy gas from the wells at issue was due to several legitimate, independent business reasons and that, once these reasons had lost their cogency, Distribution was perfectly willing to deal with Venture. Defendants set forth three such reasons: the spacing policy; a pipeline bottleneck which would, if plaintiff's gas had been purchased, have reduced the amount of gas purchased from other wells already under contract; and the need to have Public Service Com-

mission approval of Distribution's purchase contract with a price escalation clause. However, these asserted reasons do not destroy plaintiff's case; there is sufficient evidence for the jury to have rejected any or all of them as mere pretexts.

The asserted efforts by Distribution to intervene with Flint to obtain Flint's consent to an early shut-down of operation for the Christmas holidays could easily be construed as a mere sham. It is difficult to believe that Flint would, for independent business reasons, abandon a well already partially completed. Once it is inferred that Flint and Distribution were conspiring, what is described to the victim of the conspiracy as a vigorous, persuasive effort by Distribution followed by an extremely reluctant consent by Flint could easily have been classified as a mere effort to confuse the evidence.

Distribution was aware by late 1975 that plaintiff was in what plaintiff characterized as an "embryo" stage and purportedly needed immediate answers in order to establish its success and proceed with its drilling program. Nevertheless, Distribution refused absolutely on December 3rd to purchase the Boyd and Grant gas, on the stated basis that such would violate the spacing policy. Yet, five months later, after (the jury could find) Venture's plans had been frustrated and it had ceased to be a threat, Distribution was willing to waive the policy — which, assertedly, was waivable only for sound geological reasons — but only if plaintiff would agree to conform to the policy in the future and drop its then threatened lawsuit. The jury could logically have taken a similar cynical view of Distribution's offers to purchase gas from the wells on the Bennett and Nickerson tracts. Neither of these wells was owned at the time of lease approval by Venture, but by other enterprises owned by William Waytena. They could have been seen as less of a threat to Flint's large position.

Similarly, if the pipeline bottleneck was a true reason, Distribution might have been expected to mention it in the

December meeting instead of relying wholly on the spacing policy, and to combine its then refusal to purchase with an offer to purchase gas if and when pipeline capacity was increased (which Distribution now argues had taken place by April 1976). Its complete failure to do so renders this explanation suspect at best.

Finally, Distribution asserts that it could not have purchased Venture's gas because of the pending state agency's investigation of the gas purchase contract's form. However, Distribution did not show that it refused any other requests for connections on this basis. It was apparently quite willing for connections on this basis. It was apparently quite willing to agree to purchase the Frey gas when drilled by Flint. Additionally, the letter from the agency staff to which Distribution points as its principal evidentiary support for its supposed inability to purchase was not received until mid-December 1975, well after Distribution's initial refusals to purchase and is a far less absolute prohibition than defendants suggest. In terms, it merely disallowed one form of 15-month, fixed price contract.

Moreover, this issue was not mentioned by Distribution after the November 19th meeting, and was never mentioned by it until this trial as a reason for refusing absolutely to make even a tentative commitment to purchase Venture's gas when and if approval was obtained from the Public Service Commission. Distribution might have concluded that the pending investigation made it impossible or imprudent for Distribution to sign a contract, but nothing in the record suggests that Distribution would have been, or reasonably have thought that it was, in any way precluded from saying, "we will buy your gas on such terms, if any, as the Public Service Commission approves, when such agency approves them" *if* it had wanted to buy plaintiff's gas. The jury could logically have inferred from its failure to do so that it did not want to purchase plaintiff's gas.

Finally, defendants point to testimony showing that the spacing policy was strenuously opposed by Flint and had a serious effect upon its operations. They argue that such evidence conclusively rebuts any inference of concerted action. However, it is not necessary to a finding of conspiracy that Fox and Giallombardo actually agreed to implement the spacing policy. If they agreed to frustrate the plaintiff's ambitions, and then Fox independently implemented or administered the spacing policy in futherance of that agreement, that would be sufficient to find liability. Moreover, plaintiff requested that the jury infer concerted action less by judging the validity of the spacing policy on its face than by considering its hasty implementation and retroactive application to what Distribution knew to be a fragile developmental-stage enterprise. There was no evidence that Flint opposed or was injured by the timing of the spacing policy's introduction.

In short, there was sufficient evidence for the jury to reject the reasons put forth as *post hoc* rationalizations and the subsequent offers to purchase from Venture and from Waytena's other enterprises as efforts to confuse the record, after accomplishment of the objective. The record is such that the jury could have inferred the existence of a well-executed scheme to keep moving the pea one step ahead of Venture until the latter concluded that it would never win the game.

E. The Termination of Venture's Active Operations

Defendants' final contentions relating to liability are that plaintiff either ceased business voluntarily, with the intent of bringing a lawsuit against defendants, or collapsed due to its own incompetence and/or lack of experience. Defendants point to several substantial items of evidence as support for their claims, most importantly the failure of plaintiff to explore the opportunity mentioned at the November 19, 1975 meeting to drill for gas in the Arcade area, the failure to pursue the purported opportunity granted December 17, 1975 to resolve the dispute with Flint over the Frey tract, what defendants

characterize as Venture's abandonment of its right to drill under the Frey lease by failing to pay delay rentals and by accepting without challenge the contention of Frey's lawyer that the lease had lapsed, Venture's subsequent transfer of the Bennett and Nickerson tracts to other companies (Clearwater Systems, Inc. and Gas Production Associates, Inc.), and its failure to accept Distribution's conditional offer to purchase the Boyd and Grant gas in April 1976.

Plaintiff's officers testified at length in response to these contentions. First, they testified that plaintiff had failed to explore the suggestion that it drill in the Arcade area because it was interested only in "old" or established natural gas fields because of its need to show success in its initial drilling program and that the Arcade area had no such fields. They testified that plaintiff had failed to pay delay rentals as mentioned on the Frey lease because it had been clearly understood, albeit not spelled out in the lease, that Frey had agreed to the lease because he wanted, for tax reasons, to have the well drilled, with his financial participation, prior to the end of 1975. Frustration of this goal would have made and did make Frey an unwilling landlord, as was made clear by his attorney's assertions. Whether Venture had a legal right to continue drilling, its officers testified that they had decided that under the circumstances (which included the prior refusal by Distribution to buy gas from that property) such drilling had not been worth pursuing. Whether that decision had been reasonable was for the jury to decide. Similarly, there clearly was evidence from which the jury could have concluded that Venture's admitted failure immediately to act upon the possibility of an accommodation with Flint had been made moot by the problems with the Frey lease. Additionally, whether Venture's officers' failure to act on the Flint work stoppage had affected the reasonableness of their decision on the Frey lease was argued extensively before the jury and was for it to decide.

Defendants next argue that Venture had transferred the Bennett and Nickerson leases from which Distribution had agreed to purchase gas to other entities (Gas Production Associates, Inc., and Clearwater Systems, Inc.) and had ceased business in order to avoid being successful and to set up a record for litigation. Venture's officers testified in substance that they had transferred the leases and had ceased active operations because they had concluded that Distribution would not, in good faith, buy Venture's gas and that ceasing operations was the only prudent course. I cannot say that the jury strayed beyond the limits of rationality in accepting Venture's explanations.

F. Absence of Economic Testimony

Defendants further argue that there was no testimony from economic experts that implementation of Distribution's spacing policy had any effect on overall competition in the natural gas production business, and that such expert economic testimony would have been essential to a jury finding that the charged conspiracy unreasonably restrained competition in the market. Defendants are quite correct as to the somewhat striking absence of such economic testimony, and I assume *arguendo* that the realm of antitrust economics is sufficiently distant from the concerns of most individuals that, as with claims of medical malpractice, expert testimony would be a prerequisite to a finding of liability based on an "unreasonable restraint of trade." However, the jury was also charged as to certain *per se* violations of the antitrust laws. (Defendants' arguments that these charges were erroneous will be treated in section III *infra*.) If they found that such were proven, and that damages had flowed therefrom, they need not have found an unreasonable restraint of trade to find the section 1 violation that they did. Defendants' fundamentally correct arguments that there was a failure of proof on the issue of "unreasonable restraint" does not require, or permit, entry of judgment n.o.v. on the section 1 claim.

Additionally, as the scope of New York's Donnelly Act is similar to but somewhat broader than that of section 1 of the Sherman Act, my decision mandates denial of defendants' motions for a directed verdict and judgment n.o.v. on plaintiff's Donnelly Act claim. *See, e.g., State* v. *Mobil Oil Corp.*, 38 N.Y.2d 460, 381 N.Y.S.2d 426 (1976). I do not find persuasive defendants' arguments, supported by some federal district court *dicta (see, e.g., Harlem River Cons. Co-Op.* v. *Assoc. Groc.*, 408 F.Supp. 1251, 1286 (S.D.N.Y. 1976)), that the *per se* rules developed under the Sherman Act are not applicable under New York's Donnelly Act. Additionally, my determination that there exists sufficient evidentiary support for the jury's verdict under and for this court's jurisdiction pursuant to section 1 of the Sherman Act, makes plaintiff's verdict pursuant to section 340 of New York's General Business Law largely if not wholly academic.

G. Conclusions

In sum, the evidence presented at trial is such that the jury's decision that there was a conspiracy between Flint and Distribution to exclude Venture from the western New York gas drilling business, and that such conspiracy was causally linked to Venture's decision to cease active operations, may not be set aside by me as at variance with unquestioned or indisputable facts, or otherwise as outside the bounds of reasonableness. Defendants' contention that there has been no connection shown to National Fuel Gas Company is correct and unopposed by plaintiff.

Additionally, the verdict herein is not so contrary to the great weight of the evidence that I would be justified in setting the verdict aside and ordering a new trial. As explained above, I may order a new trial on the grounds of inadequate evidence only if I am convinced that a serious error has been committed or that a miscarriage of justice has resulted. *See, e.g., Bevevino* v. *Saydjari, supra,* 574 F.2d 676 (2d Cir. 1978). I am not persuaded that any such error or miscarriage resulted. While I

may not agree with the jury's verdict, I would not be warranted in setting it aside. Although lengthy, this action was not of extreme factual complexity. Essentially, the action involved plaintiff's witnesses telling one story and defendants' telling quite a different one. Neither side's testimony was free of contradiction; many of the witnesses were substantially interested in the outcome. The action resolved itself into questions of credibility, the determination of which is perhaps a jury's greatest ability. Because of the importance herein of issues of credibility, I am extremely reluctant to upset the jury's decision. On the evidence presented I would not be justified in so doing.

II. *Legal Insufficiency of the Verdict*

This section will present three additional lines of argument against the verdict: that the evidence failed to show a sufficient connection with interstate commerce; that Venture failed to show that its 1976 drilling program was a "business" for the loss of which it could recover antitrust damages and failed to introduce competent evidence of any damages; and, finally, that Venture is estopped from proving damages. Because such arguments involve standing, the rules of evidence and estoppel, rather than a general review of the evidence presented, they may be classified for lack of a better description as defendants' "legal" arguments. I recognize that the evidentiary content of what follows is nearly as high as that of section I, *supra*.

A. Federal Jurisdiction

Defendants argue that the evidence herein does not show a relation with interstate commerce sufficient to support federal subject matter jurisdiction. A nearly-identical contention was raised by defendants in support of their December 1979 motion to dismiss and was rejected by me in a lengthy decision, issued January 21, 1980, familiarity with which is assumed. It will be discussed only at much less length here.

The facts relating to federal jurisdiction are essentially as follows. Plaintiff sold none of its products interstate and would not have done so even if it had prospered; it was essential to local natural gas production that such gas not be subject to the price controls imposed on interstate shipments of natural gas by the Federal Natural Gas Act, 15 U.S.C. §717. Locally-produced gas was carried by Distribution in the New York portions of certain interstate natural gas pipelines during a severe natural gas supply emergency in early 1977, but Distribution did not and does not do so routinely and did not do so at all during the period of plaintiff's active operations. More than three-fifths of the cost of the Boyd well drilled by C & R for Venture, at Venture's expense, consisted of goods and services purchased from corporations located outside of New York. Waytena testified that he intended that these same sources be used for later wells. Waytena had had discussions with two individuals (one a citizen of New Jersey, the other a citizen of California) concerning investment in future Venture wells; these individuals expressed substantial interest in contributing some $700,000 to Venture's proposed 1976 drilling program; this would have constituted a substantial portion of the anticipated cost of any such program.

Additionally, Distribution's spacing policy was instituted on a uniform basis whenever Distribution purchased natural gas directly from gas wells; such purchases were and are made in both New York and Pennsylvania. Natural gas purchased from these wells is chemically identical to that purchased from interstate pipelines and delivered from Oklahoma, Texas and other southwestern states, and each acts as a substitute for the other. There was testimony that during the relevant period Distribution was suffering from a restriction in interstate pipeline gas, resulting from a national shortage, and was accordingly refusing to supply industrial gas customers with as much gas as they desired to purchase.

From the evidence before me, I may infer that plaintiff's continued operation would have resulted in a flow of investment capital, measured in the hundreds of thousands of dollars, from outside New York to the plaintiff and a flow of the same order of magnitude directed outside New York, for the purchase of gas drilling equipment and supplies. The jury determined that a conspiracy among defendants prevented plaintiff's business from developing. This clearly amounts to a substantial adverse effect on interstate commerce, both in investment capital and in drilling equipment. This substantial impact, when combined with the uniform interstate application of Distribution's spacing policy, is far more than the minimum necessary to support Sherman Act jurisdiction, which Congress meant to be as broad as constitutionally permissible under the commerce clause. *See, e.g., Hospital Bldg. Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 743 (1976); *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186, 194-5 (1974); *Lehrman* v. *Gulf Oil Corporation,* 464 F.2d 26, 32-33 (5th Cir.), *cert denied,* 409 U.S. 1077 (1972) (gasoline produced, refined, distributed and consumed in Texas but subject to marketing procedures applied in several states, where defendants' action affected plaintiff's interstate purchases of automobile tires and parts).

B. Damages

1. Introduction

Defendants make several distinct but closely-related challenges to the jury's award of damages. They assert first that no damages could be awarded for any loss of profits from the projected 24-well 1976 program because such program was only an "expectancy" and not yet a business entitled to damages in a private antitrust action and was, in addition, wholly speculative. Second, they argue that the only testimony establishing damages is fatally defective for several reasons: first, because it included losses from the 1976 drilling program; second, because it was based on incompetent hearsay; and

third, because the computation of damages necessarily involved drawing several opinions and conclusions for which the witnesses had no expertise and that, therefore, the whole testimony must be stricken. They also argue that there was absolutely no evidence to support the actual $500,000 in damages awarded by the jury and that, accordingly, the verdict on its face esablishes an impermissible compromise on liability. Defendants argue that because of these failings judgment should be entered n.o.v.

2. Remedy

To begin the discussion, it seems clear that for whatever defects may have occurred relating to damages herein the appropriate remedy would be a new trial, not the entry of judgment n.o.v. for the defendants. Fundamentally under challenge here are a number of evidentiary rulings during the trial: that evidence on damages could be received as to the 1976 drilling program, that the gas production decline curves employed by the expert were documents customarily relied on by accountants and financial analysts and thus opinions based upon them could be received even though the actual reports were not admissible (under Fed.R.Evid. rule 703) and, finally, that plaintiff's expert could permissibly render an opinion as to the present value of the lost profits here at issue. If I had ruled differently during trial, plaintiff would have had at least some opportunity to introduce additional evidence (or to restructure the evidence presented) in such a way as to avoid these evidentiary problems. If I were to reverse my evidentiary rulings now, plaintiff should be given the same opportunity. This requires a new trial. Similarly, a new trial is the appropriate remedy for a tainted or otherwise impermissible jury verdict. Additionally, I am narrowly persuaded that there was a sufficient basis both for the evidence presented on damages and for the jury's award thereof and that a new trial is not warranted.

3. "Business" or "Expectancy"

Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15, establishes the basic private remedy under the antitrust laws. It states that any person injured in his "business or property * * * shall recover threefold the damages by him sustained." When an established, operating business sustains a loss or profits by reason of antitrust violation, there is no question but that 15 U.S.C. §15 provides a remedy. However, where, as here, the injury claimed is to the anticipated profits of an embryonic or development-stage enterprise, a serious question arises whether what has been injured is a "business" or merely a dream in someone's mind.

Defendants claim that Venture's 1976 drilling program was only Waytena's fantasy and not yet a business. They stress that Venture had no fully drafted or finalized limited partnership agreements, only tentative and varying plans for the financial structure of such partnerships, no money actually paid in from outside investors, no leases or permits obtained, no stock issued to its three principals, and no complete corporate records. They further argue that there was no sufficient proof of any ability to raise the necessary funds or of expertise to assemble the requisite leases and arrange for the drilling of wells on the necessary schedule.

Defendants' arguments here are clearly tenable; during the course of the trial I seriously questioned whether a sufficient foundation had been established to permit the introduction of testimony relating to the 1976 drilling program. However, I was then and am now persuaded that an adequate foundation had been laid. It is not essential that an enterprise actually be engaged in a market to attain the status of a "business." What is required is that the enterprise possess both the "intent" and the "preparedness" to enter the market from which it claims to have been excluded. *See, e.g., Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 993-95 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956

(1978); *Laurie Visual Etudes* v. *Chesebrough-Pond's, Inc.*, 473 F.Supp. 951 (S.D.N.Y. 1979).

Venture's 1976 drilling program was substantially more than a dream. It is true that many items essential to its proposed drilling programs were not yet in place. However, its founder (who, the jury well could have found, was an individual with considerable experience and conspicuous success as an entrepreneur) had by the late autumn of 1975 induced two investors, Mytkowicz and Gorman, to make at least tentative commitments to invest almost three-quarters of a million dollars in the proposed company. He had obtained the services of O'Neill and Panaro, both of whom had been acting as consultants in the gas business before coming to Venture. These individuals and Waytena had conceived the plan for a small number of what would be essentially demonstration wells in 1975, followed by an active drilling program in 1976, with a "target" of 24 wells but proceeding at whatever rate the funds and the drilling sites could be put together. O'Neill and Panaro were actively seeking gas leases; as these are often of only a few months' duration, it is not fatally "unbusinesslike" that Venture did not have a long list of committed lessors. Similarly, the substantial interest showed by Mytkowicz and Gorman prior to finalization of the financial arrangements is substantial evidence that Waytena's decision that Venture should drill first and fix the details of the drilling programs later was not a decision that would deprive Venture of its character as a business for purposes of 15 U.S.C. §15.

It is clear that plaintiff's affairs were not conducted with the precision or documentation expected of a major industrial company; however, its plans and prospects had attained sufficient solidity and calculability that their frustration may be monetarily compensated under 15 U.S.C. §15.

Plaintiff's preparations and apparent ability to enter the gas drilling business were far better established than those found insufficient in *Laurie, supra*. Defendants would deny plaintiff any right to recover absent signed leases and financial commitments for all the wells in its 24-well drilling program. Under the business practices of independent gas drillers, wherein leases and financing are formalized only shortly before drilling begins, such a requirement would be tantamount to denying recovery completely to all but established drillers. This is clearly contrary to law and impermissible.

Similarly, the drilling program was not so speculative that a jury would be forced to guess at the amount of damages. Its lost profits were not based wholly on plaintiff's assertions, but were calculated by a financial analyst employing production projections derived from actual western New York gas wells (defendants' objections to his testimony will be discussed *infra)*. There was essentially unrebutted testimony that only two types of financial arrangement were being considered. Venture's damages calculations were based on what its damages expert testified would be the less profitable arrangement. Any uncertainty arising from this indeterminancy was therefore borne by plaintiff. Most of the expenses that Venture would incur in its drilling program would be simple multiples of those incurred in the completed Boyd well and thus could be accurately predicted. There were, in addition, no complex questions of future free-market prices or consumer acceptance of a new and untried product. Venture's proof as to its losses was not impermissibly speculative.

In determining the correctness of admitting plaintiff's evidence as to damages, I must start from the premise that courts have long recognized the difficulties of establishing damages flowing from a partial or total exclusion from a market, and have permitted juries "to act upon probable and

inferential, as well as direct and positive proof." *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 124 (1969); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 564 (1931). This use of less-than-certain proof has been permitted simply because any alternative would allow a wrongdoer to profit from his wrong. *Bigelow* v. *RKO Radio Pictures, supra.* As long as there is some evidentiary basis for an estimate of the lost profit, such an estimate may not be excluded. Such estimates have been excluded only where they were based on projected profits wholly unsupported by the record, or where there was no showing of how an estimate of lost profits had been assembled. *See, e.g., Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 677-78 (10th Cir. 1977).

Plaintiff's evidence as to the amount of damages consisted solely of the testimony of its "expert" on damages, one Arnold Maxick. Maxick is a certified public accountant who has served for a number of years as an accountant for several of Waytena's enterprises. I permitted Maxick to offer his opinion that plaintiff would have recovered $1,288,900 in profit from a 24-well drilling program from which Venture would receive an "overriding royalty" of 1/8 of total well output, and an additional royalty, after the outside investors had recovered their investments, of 40% of the remaining payments. This arrangement was, according to Maxick, the less profitable of the two possible financial plans. This estimate was based on the following: recoverable reserves of 125 million cubic feet ("mcf") per well, produced over a 12-year-period, following a production decline curve constructed by Maxick as an average of two decline curves for Medina (the gas-producing stratum) trend gas wells, computed by two geologists for differing numbers of years — one prepared by David Copley, contained in a published speech to The Petroleum Institute, the other consisting of figures stated in a telephone conversation with

Maxick by one Carl R. Burgchardt, a petroluem geologist employed by a National Fuel Gas Company subsidiary located in Pennsylvania. Maxick further assumed that all wells would be successful, estimated $60,000 as the capital cost per well, $50 as the monthly maintenance cost per well, and 12% as the applicable discount rate. He further estimated that the price received for natural gas and the monthly maintenance cost would increase at 10% compounded annually.

Defendants made and make three fundamental objections to receipt of this evidence: that it is based on hearsay testimony not in evidence, that the cost estimates used are unsupported by any real data and that Maxick was not competent to render an opinion based on this material. Maxick's testimony and estimate could be much more firmly grounded, and his testimony shows serious signs of hasty and arguably shoddy preparation; nevertheless, I am still persuaded, as I was at the time I allowed the testimony into evidence, that it is competent and admissible and that its substantial deficiencies go only to its weight.

Maxick's testimony was clearly based heavily on materials not in evidence: neither the printed copy of David Copley's speech nor Burgchardt's data was received in evidence; his estimate that average recoverable reserves totaled 125 mcf was an average of three figures, contained in a "Ryder-Scott" petroleum report, a "Sipes" petroleum report, and the telephone conversation with Burgchardt, none of which was in evidence. All these materials constitute out-of-court statements received to prove the truth of what they assert, and are therefore hearsay. Prior to the adoption of the Federal Rules of Evidence, experts could not testify as to any opinion not based entirely on material in evidence; under this regimen, Maxick's opinion testimony clearly would not have been admissible. However, this rule was changed by the Federal Rules of Evidence. Rule 703 provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Maxick had prepared financial statements for enterprises in the oil and gas business and had also served from time to time as a financial analyst, making recommendations on the fair purchase price of businesses, which duty necessarily involved estimation of the stream of profits to be anticipated therefrom. The relevant field of expertise, therefore, is that of accountants and financial analysts. Accountants are almost by definition not experts in the businesses of the companies they audit, their responsibility is to allow comparison of companies engaged in many separate trades, by reducing all such businesses to specialized terms and figures. In auditing books or preparing financial analyses, an accountant or an analyst necessarily must rely on reports submitted by and information received from persons familier with the field for such essential factors as determining the useful life of plant and equipment. Accountants and analysts reasonably and necessarily rely on data comparable to that contained in the Ryder-Scott report, Sipes report, the Copley speech and the Burgchardt telephone call. Maxick's evidence is not inadmissible because based on materials not in evidence. It is, of course, necessary that the facts employed by the expert in reaching his conclusions bear at least a reasonable relation to the evidence. *See, e.g., United States* v. *R. J. Reynolds Tobacco Co.*, 416 F.Supp. 316, 323-25 (D.N.J. 1976). Upon cross-examination it was revealed that Maxick had made no separate allowance for taxes, rent, legal expenses, officers' salaries or miscellaneous operating expenses, and that it was assumed that all wells drilled would produce gas at commercially viable levels. It was further revealed that the production decline curve used by Maxick was

not merely an average of two curves for the same time period by experts whose opinions differed, but was an arithmetic amalgamation of two curves for depletion over greatly different periods of time — 7 and 20 years.

The failure to include rent, salaries, *ett.* as specific cost items does not, on the facts of this case, create a serious problem as to admissibility of the evidence. These items should have been specifically included in preparing the estimate. *See, e.g., Pitchford* v. *PEPI, Inc,.,* 531 F.2d 92, 109 (3d Cir. 1975), *cert. denied,* 426 U.S. 935 (1976). However there was substantial testimony to the effect that the three principal officers of Venture had served without any salary for the months of its operation, that Venture shared quarters with another Waytena enterprise and paid no rent and that, in general, its routine operating expenses, and those of other gas production companies, were not very substantial. Rough approximations may be used in estimating damages if reasonable, even if more precise figures are available. *See, e.g., Higgins* v. *Kinnebrew Motors, Inc.,* 547 F.2d 1223, 1226 (5th Cir. 1977) (United States Bureau of Labor Statistics cost-of-living estimates may be used in computing wrongful death damages even if actual living cost figures are available and substantially higher than estimates). The estimate of $60,000 for actual drilling costs was shown to be generous and to have left room at least for incidental capital expenses. Defendants brought the failure to include these operating expenses to the attention of the jury, which was free to make additional allowance for them if deemed necessary. The use of 125 mcf as recoverable reserves is supported by evidence; defendants were free to, and did attempt to, show that lower figures were more accurate; but such showing would affect weight, not admissibility. Similarly, there was evidence that it would be possible, if less than optimal, for a gas production company to "get by" on the level of attention obtainable for $50 per month. Additionally, as there was evidence that less than 1% of wells in old Medina trend gas

fields produced no gas, it was not fatal to fail to take dry holes into consideration. There were omissions in the damages testimony but, because of the nature of the western New York gas production business, the effect of these was not so great as to render the opinion inadmissible.

I was and am seriously concerned about Maxick's choice of a 12-year depletion period and his own construction of a decline curve to fit such period. The evidentiary support for the period is minimal and Maxick's qualifications to compute such curve dubious. However, there was no serious objection to Maxick's use of a 12% discount rate and of a 10% compounded annual increase in the price of natural gas. These figures are sufficiently close to each other that even substantial errors in the term of years of production and of the rate at which production declines would have only a modest effect on the estimate. While such slipshod calculations are not to be condoned, they have not been shown to have affected the estimate to the extent that it is not admissible under the deliberately relaxed standards of *Bigelow* v. *RKO Radio Pictures, supra.*

Defendants further contend that Maxick's testimony is inadmissible because it assumed that plaintiff would comply with the spacing policy, while defendants urge that there is "uncontradicted evidence" that Distribution would have dealt with plaintiff had it so complied. This argument impermissibly confuses liability and damages. Maxick's testimony concerned only the profits Venture would have made if it had operated; there is absolutely no showing that Venture's compliance or non-compliance with the policy would have any effect on either the projected cost of its gas wells or the revenue it would have obtained therefrom. The spacing policy has not shown to be relevant to Maxick's testimony and Maxick's assumption does not make such testimony inadmissible. Again, defendants were free to and did attempt to discredit the estimates on this ground.

Defendants' final ground for objection to the receipt of Maxick's testimony is that he was simply not qualified as an expert to give an opinion on the value of Venture's proposed drilling program. Their objection that as a certified public accountant he was only qualified to report on past transactions and not make estimates as to future transactions is well-taken in part. If Maxick had had no other qualifications I would hold his opinion inadmissible. However, as noted above, Maxick testified that he had served as a financial analyst and advisor on purchases of businesses. Fed.R.Evid. rule 702 permits qualification of an expert by "knowledge, skill, experience, training, or education." Maxick's experience as a financial analyst is sufficient to qualify him as an expert. There was no error in admission of his testimony.

Defendants' next objection relating to damages is that there is no evidence in the record to support the jury's award of $500,000 and that, therefore, as a matter of logic, the jury's verdict necessarily represented an impermissible compromise on liability. This contention must also be rejected. It is true that no one witness ever stated that $500,000 would be an appropriate amount of damages. However, there is sufficient evidence in the record from which the jury could readily derive such a figure. There was testimony to the effect that a well producing 80 mcf would only break even, and considerable testimony to the effect that the average well where plaintiff proposed to drill would produce 80 to 100 mcf, rather than the 125 mcf posited by plaintiff. Defendants also introduced expert testimony that plaintiff would have lost $400,000 on the drilling program and supported such evidence by proof as to Flint's recent losses. The jury was not obliged to accept such testimony in full but could have employed it to cut plaintiff's projected profits of $1.2 million by somewhat more than half. It could also have concluded, from the evidence before it, that plaintiff's estimates as to costs of completing each well were too optimistic or that prudence would dictate daily maintenance, at

an additional cost of $50, or some similar figure, per well per month. The total cost of these revisions could be readily computed and subtracted from plaintiff's estimated profit. There are a number of logical paths by which a jury, given the length of their deliberations, could have arrived at an estimate of $500,000 lost profit. This is all that is required to support its verdict. Additionally, the size of the verdict is not such that it shocks the conscience or appears to be grounded in passion or prejudice against the defendants. The proposed drilling program would have cost, using plaintiff's possibly understated estimate, some $1.4 million. For an investment of such size, and of a fundamentally speculative character, the jury's award of a stream of profits over 12 years totaling, when discounted, $500,000 cannot be considered outrageous or dictated by passion. The award of damages must be sustained.

C. Estoppel

Defendants' argument that plaintiff Venture is estopped from showing any damage derives from the undisputed fact that Waytena individually, and not Venture, deducted on his Federal Income Tax return the sum of $34,481.00 paid to C & R for drilling the Boyd well. Under Treas. Reg. 1.612-4(a), 26 C.F.R. §1.612-4(a), such deductions only may be claimed by the "operator" of a well (one who holds the working or operating interest either as fee owner or under lease). Defendants urge that, as Waytena essentially claimed in these tax returns that he personally was the operator of the Boyd well, Venture may not now claim damages from Distribution's refusal to deal with it. This argument would have substantial force if the same issues were involved herein as were involved in the tax returns. *See, e.g., Duplan Corporation* v. *Deering Milliken, Inc.*, 397 F.Supp. 1146, 1177-79 (D.S.C. 1974); 1B *Moore's Federal Practice* ¶0.405[8] at pages 766-67. However, all Venture alleges is that it offered the gas for sale and Distribution refused to purchase the same. Whether it had obtained title to the gas through operation of the well itself or

acquired it by purchase, gift or otherwise from Waytena, seems of little relevance to the issues necessarily presented in this suit, especially inasmuch as defendants have never suggested that Distribution refused to purchase plaintiff's gas for this reason. Such might prevent Venture from claiming damages for the lost expenses, but recovery of such item was never requested. Plaintiff sought only its expected profits. Defendants' motions to dismiss on this ground must be denied.

III. *Claimed Errors in Admission of Evidence and in the Charge to the Jury*

A. Refusal to Admit Certain Testimony

At the end of the trial, defendants sought to permit Distribution's Vice-President (Allen Graham), who had been present throughout the trial, to testify as to a 1980 conversation a few days before with Waytena wherein Waytena supposedly told Graham that he would be tempted, in prospective litigation with defendants, to continue "gambling" with jury verdicts because the risks were less than the possible payout and the costs of such litigation are deductible as business expenses. I heard such testimony out of the presence of the jury, then declined to permit its repetition to the jury. Defendants urge that such refusal was an abuse of my discretion under Fed.R.Evid. rule 403. Defendants correctly urge that rule 403 permits exclusion of evidence generally admissible under rule 401 if the

> "probative value [of such evidence] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendants urge that the evidence was of great probative value on the issue of whether this suit was a means of recovering actual damages or a sham to make money, and that the inclusion of such evidence would not have resulted in unfair

prejudice to plaintiff. Neither of these contentions is sound. It is commonly stated among lawyers that litigation, especially where a human and therefore fallible jury must determine which party is more worthy of belief, is extremely risky, unpredictable and, in essence, a form of gambling. Waytena's alleged comment sheds no light whether the suit is a legitimate means of recovering for a real injury; it merely explains his willingness to proceed at all, despite the risks and costs. It therefore had little probative value concerning that for which it was offered; however, it could easily have led to confusion or unfair prejudice if it had been heard by the jury. The jury readily could have interpreted the comment as comparing it personally to gambling activities or to calling it arbitrary. More important, the treble damage remedy in 15 U.S.C. §15 was established by Congress as an additional incentive for private litigants to undergo the cost and risks of litigation to recover for past wrongs; Waytena's comment must be interpreted in the light of this legislative incentive. Admission of Waytena's comment could have been both prejudicial and confusing. I believe that my determination is correct under rules 401 and 403.

B. Claimed Errors in the Charge to the Jury

Defendants' final argument in support of their motions is that numerous errors were committed in my instructions to the jury.

1. "Commencing Operations" Under the Frey Lease

Defendants argue that as a matter of law Venture had, prior to December 4, 1975, commenced drilling on the Frey premises through institution of preliminary steps, and that it therefore had an absolute legal right under the Frey lease to continue to drill until January 4, 1976, and that it was error to leave this issue to the jury. Defendants have cited several commentators on oil and gas law for this proposition; however, they have not

cited any New York cases so holding. The evidence presented at trial was that the total agreement (written and oral) with Frey required commitment and expenditure of funds prior to the end of the calendar year 1975, in order that Frey could obtain tax benefits for that year and, in addition, that Frey's attorney had contended that the lease was at an end through failure to commence drilling. Under these circumstances, whether Venture had commenced drilling and whether it therefore had a right to continue drilling through the 4th of January 1976 were questions of fact for the jury; in addition, even if such instruction were technically erroneous, it is not of sufficient importance to warrant a new trial. The overall question of the Frey lease is important to mitigation of damages; however, given Frey's expressed opposition by mid-December to continued Venture operations and Frey's decision, made by approximately December 22nd, to find another driller, whether Venture could have legally (presumably, given the Frey opposition, with the necessary aid of an injunction) for another few days is at most extremely peripheral. No new trial would be warranted even if error had been committed.

2. Other Gas Gathering Lines in Chautauqua County in 1976

Defendants urge that I improperly determined a question of fact when I instructed the jury that Distribution maintained the only natural gas gathering lines in Chautauqua County and immediately adjoining areas in 1975 and 1976. There is no question that I so instructed the jury; the issue is whether such was error warranting a new trial. It was not. The evidence was undisputed that during late 1975 and the first half of 1976, the period of plaintiff's active operations, the only prospective purchaser of natural gas in Chautauqua County operating a system of low pressure "gathering" pipelines into which it was economically feasible to inject uncompressed locally-produced gas was Distribution. The only other lines then operating in the

area were high-pressure long-distance interstate lines of no relevance to this case. Only substantially later did Columbia Gas Company begin to develop a system of gathering lines. I could have set all this out to the jury; however, all such would have done is increase the length of an already burdensome charge and increase the possibility of confusion.

3. Suggestion of Other Members of Conspiracy

In the course of the charge I instructed the jury that it was not necessary "for Venture to join as Defendants all persons who may have participated in the alleged conspiracy." Defendants excepted to this restatement of hornbook conspiracy law, which had been specifically requested by plaintiff, as somehow suggesting that there might be other members to the charged conspiracy besides Flint and Distribution, particularly Paragon. In the absence of any claim by plaintiff at trial that Paragon was a conspirator, I do not understand how it might be considered improper. No error was committed.

4. Failure to Instruct re Absence of Fox Live Testimony

It was stipulated by the parties that John Fox was beyond the subpoena power of this court; such stipulation was before the Jury. Defendants contend that it was reversible error not to have further instructed the jury that no adverse inference should be drawn from the failure of defendants to have produced Fox to testify in person. Such failure was alluded to by plaintiff's counsel in his summation, but I concluded that the issue had not been "leaned on" enough to justify any such instruction. I adhere to such view; additionally, however, there is another reason why such an instruction was not and could not properly have been given. Fox was not and is not a stranger to the parties to this litigation; he was a responsible former officer of Distribution and was, at the time of his deposition and, for all the record shows, at the time of trial, the President

of Paragon, a company which sells large quantities of natural gas to Distribution. There are other ways to procure the attendance of a witness beside a court subpoena; in the absence of even the slightest showing by defendants' counsel that they had even requested, much less demanded, that Fox appear voluntarily, any such instruction would have been not only not harmless, as defendants now urge, but actually improper.

5. Inadequacies in Unreasonable Conduct Charge

Defendants urge that I erred in instructing the jury as to New York's "law of capture" in conjunction with "reasonableness" while not discussing at greater length other factors which might affect reasonableness. They do not urge that New York's rule on ownership of natural gas was not the law of capture as described in the charge; what defendants assert is that under my charge this rule was the sole relevant factor. It is true that it is the only factor explicitly set forth; however, I expressly instructed the jury to consider all the facts and circumstances and only then discussed the law of capture as something they should consider. I never stated, expressly or impliedly, that it was the only relevant factor. Defendants urge that I should have balanced this by setting forth a list of defendants' proffered justifications for the policy (contained in the remainder of defendants' Request to Charge No. 9). I declined to give such charge partly because I believed it not to be supported by the undisputed evidence (as defendants now urge that I erred with respect to the gathering line issue, *supra)* but, more fundamentally, because the asserted justifications for the policy had just been set forth with considerable eloquence by Distribution's counsel in his summation and I am extremely reluctant to engage in any more summarization of the evidence than is absolutely necessary. Such summarization is the function of counsel; when I do so it is fraught with the peril of appearing to favor one side or the other. By contrast, I instructed the jury on the law of capture because it is a relevant

issue of law, on which I am required to instruct the jury. I gave such instruction at the point where I did so because it there seemed most felicitously to fall into the contiguous material. No error was made and no new trial is warranted.

6. Mitigation of Damages — Offers by Defendants

As already noted, the evidence shows that Distribution offered in April 1976 to purchase the gas from the Boyd and Grant parcels. Such offer was conditioned on Venture's agreeing to conform to the spacing policy and abandoning all opposition thereto, including this suit which then was already threatened. This offer was clearly relevant to the issue of mitigation of damages. Defendants requested that I instruct the jury that it should consider any offer to purchase and evaluate any conditions attached thereto to determine their reasonableness. I declined to give this charge as requested. I instructed the jury that if an unconditional offer were made it should be considered. Defendants urge that this narrowing constituted error. I narrowed the charge to avoid plaintiff's entirely correct argument, couched in its Requests to Charge and also brought to the attention of the jury, that defendants legally could not, under the guise of mitigating damages, force plaintiff to abandon its threatened suit for damages already sustained. The charge proffered by defendants would have been erroneous for this reason; I attempted to avoid the problem by my use of "conditional" in the charge. A more detailed discussion, separating legitimate from unlawful conditions, might have been slightly preferable; but inasmuch as the evidence was quite clear that Distribution's April 1976 offer required abandonment of this action and, in the overall context of the charge on mitigation of damages, which stressed the duty of plaintiff to avoid unnecessary harm to its business, and after the substantial references to this issue on summation by counsel, no prejudice could reasonably have resulted to defendants from any imprecision in the wording.

7. Donnelly Act Charge

Defendants argue that I was required to charge that the standard of liability under the Donnelly Act (section 340 of New York's General Business Law) is identical to that under the "rule of reason" component of the Sherman Act and, further, argue that I was required to define further the terms "lessen competition" or "interfere with the free pursuit of a lawful business" used in connection with such charge. I will concede that the meaning of these terms is less than crystalline. However, although it was and is difficult to be certain because there are so few authoritative cases interpreting the Donnelly Act, I consider that my instruction accurately restates the existing law under the Donnelly Act and that the further explication requested by defendants would very probably have been inconsistent with this law. *See, e.g., Eagle Spring Water Co.* v. *Webb & Knapp, Inc.*, 236 N.Y.S.2d 266 (Sup. Ct., N.Y. Cty 1962.)

8. Failing to Give Certain Other Charges Requested By Defendants

Defendants object to my failure to give requested charges (j), (k), (l), 10, 16A, 37A, 43A and 88, and to my failure to instruct the jury that it should consider motivation for and potential benefit to be gained from entering into a conspiracy. Defendants have not specified the grounds for their objections and they will be considered only briefly. I declined to grant charges (j), (k,) (l), 16A and 88 because such would have amounted to a summarization of the evidence. I declined to charge 37A and 43A partly because of undue summarization and partly because the proposed definition of the market was erroneous, for reasons I will discuss *infra*. Request to charge 10 was granted in substance.

9. Market Definition

Defendants argue that I erred in defining the relevant market " solely from the plaintiff's perspective" and failing to let the jury consider the other sources of supply available to Distribution. My charge to the jury on the issue of market was as follows:

> "The boundaries of this market must be determined by a realistic analysis of the alternatives reasonably available to persons seeking to take advantage of the market. In the case before you you must determine what alternative purchasers were available to a seller such as Venture. An extremely important part of this determination is the time at which the relationship of the parties is considered. The time that is most relevant to the analysis is that prior to the actual location of Venture's wells when its officers were seeking locations. To determine what were Venture's reasonable alternatives you must consider the potential purchasers in all locations where a person in Venture's position could reasonably have lcoated its wells and gone into the production business. In this inquiry it is relevant, but not at all controlling, that Venture finally chose to locate its wells in a place where National was admittedly the only possible purchaser. Only if you consider Venture's overall choices will you be able to measure the actual degree of power possessed by the actors in the market and the level of competition. * * *"

It is clear that this charge does not allow the jury to consider the other sources of supply available to or used by Distribution. Defendants cite a number of cases apparently supporting its position that such was required. However, under the unusual circumstances of this case, this charge was not error. There are very few reported antitrust decisions discussing markets where the conduct of the buyer is at issue, although misconduct by a buyer clearly may be actionable under the Sherman Act. In a conventional antitrust case, where conduct of a seller is under

scrutiny, the conventional analysis of geographic and product markets is helpful and, indeed, probably necessary to allow constructive analysis of the economic power wielded by the various parties, and alternatives available to both buyer and seller must be considered. However, this mode of analysis simply does not work on the facts of this case. Plaintiff is a producer of subterranean natural gas. It cannot produce any other product and there was undisputed testimony that the only economically viable thing to do with such gas is to feed it into a low-pressure pipeline not requiring special compressor facilities. The only choice available to a seller of such a product is where to locate his wells and to which pipeline to connect it. Under these circumstances, which were undisputed, the other potential sources of supply to the buyer are wholly irrelevant to determining how much power the parties possess and a discussion thereof would only have been confusing to the jury. The market definition I employed was unusual; however, because of the unusual facts of this case I believe it was essential to consideration of the relevant issues by the jury. No error has been shown.

10. The *Per Se* Charges

Defendants argue that several of the *per se* instructions given by me in the course of instructing the jury constituted error. Defendants' arguments here are tenable and raise several important and unsettled issues of antitrust law; moreover, since, as I noted earlier, there was no economic evidence of any general adverse effect on competition, if these charges are all without legal basis, then it would be necessary not to set aside the verdict and order a new trial but to enter judgment for defendants. These instructions are therefore critical. However, after full consideration of defendants' arguments I remain persuaded that they are required by law and were correctly given. Defendants object specifically to my having given three *per se* charges; these may be called the "refusal to deal" or

"boycott" charge, the "essential facility" charge, and the "price maintenance" charge. They also assert that the "price maintenance" charge was erroneous as prejudicial and inadequate. These arguments will be considered in the order just mentioned.

In the course of my instructions to the jury, I charged them that:

> "Venture has alleged a second type of conspiracy among Defendants that the law classifies as a per se violation. This is a conspiracy or agreement between one or more firms at one stage of production or distribution; here the production and selling of natural gas, and a supplier or customer of this firm or of these firms, and that the supplier or customer will refuse to deal with one or more competitors of that or those firms. However, such a conspiracy is per se unlawful only if it is entered into for anti-competitive purposes instead of for some legitimate economic reason. This rule is the first of the exceptions that I mentioned to the principle that a business person is free to deal or refuse to deal with whatever suppliers he sees fit.
>
> "In order to establish a violation of this claim, Venture must establish the following:
>
> "That there was an agreement or conspiracy between National and either Flint or some other producer of natural gas that National would not buy gas from Venture.
>
> "That the purpose of this agreement was to reduce competition in the supply of natural gas and not for some sound business or economic reason.
>
> "That National refused to buy gas from Venture.
>
> "If you find that Venture has shown these three elements, you must find that any defendant who was a party to the conspiracy has committed a violation of Section 1 of the Sherman Act. * * *"

Defendants argue forcefully and tenably that the antitrust laws do not make this a *per se* violation. Their argument is that any agreement between Distribution and Flint was necessarily a "vertical" conspiracy — that is, an arrangement or agreement between companies at different stages of the process whereby goods and services are finally delivered to the consumer — and that such vertical arrangements are not subject to *per se* antitrust prohibitions because they are not inherently devoid of economic justification or inimical to the public interest. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47-58 (1977). However, one category of agreement that is subject to a *per se* rule is the so-called group boycott or concerted refusal to deal. *See, e.g., Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). The facts of *Klor's* are important to my holding herein. Plaintiff therein was an independent retailer of electrical appliances and alleged that Broadway-Hale, a large department store also retailing electrical appliances, and a number of manufacturers of electrical appliances had conspired to cease selling to Klor's. The court held that this type of agreement was devoid of economic justification and actionable even if Klor's was the only retailer injured and overall competition in the retail sale of electrical appliances remained vibrant. Defendants here argue that *Klor's* involved only a horizontal agreement among competitors (the manufacturers of the appliances) whereas any agreement here was purely vertical — *i.e.*, between Flint, a seller of natural gas, and Distribution, a buyer. However, *Klor's* also had substantial "vertical" elements and the instant action has a substantial horizontal component.

The classic "group boycott" occurs when a group of competitors (for example, retailers) agrees not to buy the products of a wholesaler so as to coerce that wholesaler either to stop dealing with another retailer or to cease itself attempting to compete with the retailers through factory stores or direct consumer sales. *See, e.g., Fashion Guild* v. *Trade*

Comm'n, 312 U.S. 457 (1941); *Eastern States Lumber Ass'n* v. *U.S.*, 234 U.S. 600 (1914). The agreement and the intended victim of the agreement are all on one level of distribution. In *Klor's*, however, the agreement was both vertical and horizontal, and the target of the agreement was vertically oriented to the agreeing competitors. Broadway-Hale's agreement with the manufacturers was vertical, as was the manufacturers' relationship to the boycotted company, Klor's, Inc. There is, moreover, nothing in the *Klor's* opinion that suggests that the horizontal agreement between the manufacturers was essential to the decision. From an economic perspective, there would have been no need for the horizontal component of the agreement if there had not been so many manufacturers of electrical appliances; what was essential was the vertical agreement with Broadway-Hale. Defendants herein also fail to recognize the horizontal aspects of any agreement between Flint and Distribution. Distribution's corporate sibling Supply held large numbers of gas leases and received royalties under the farmout agreements; it therefore shared many of the interests of gas producers although it was not an active producer itself. The nature of the relationship between Flint and Distribution was sufficiently horizontal that I believed and believe that it fell within the letter and spirit of *Klor's* and charged the jury accordingly.

Defendants urge, however, that the United States Court of Appeals for the Second Circuit has read the *Klor's* decision narrowly and refused to apply its *per se* rule to a decision by a wholesaler or manufacturer to terminate one dealer in favor of another. *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d cir.), *cert. denied*, 439 U.S. 946 (1978), *opinion after remand*, 1980 CCH Trade Cases ¶63,619 (2d Cir. Nov. 5, 1980). I have studied the *Oreck* decision closely and have concluded that, despite some expansive *dicta*, the United States Court of Appeals for the Second Circuit did not intend it to apply to the facts at bar. Centeral to the *Oreck* decision was the court's

clearly correct determination, similar to that in the *Continental TV* case, that exclusive dealerships and similar restrictions by a manufacturer relating to distribution of his product are practices clearly not without substantial economic justification, inasmuch as they promote interbrand competition. They generally should not be subject to the judicial blunderbuss of a *per se* rule. Here, however, the product is perfectly uniform; there is no possible economic justification for the practice in the form of promotion of interbrand competition; moreover, the community of interest between the producer and buyer here casts any agreement between the two in a suspect light not present in *Oreck* where the interests of the parties to the complained-of agreement were far better separated. The *Oreck* decision and such judicial progeny as *Borger* v. *Yamaha Intern. Corp.*, 625 F.2d 390 (2d Cir. 1980), are sound and correct as applied to most of the commercial agreements between manufacturers and dealers, but I do not consider that (despite certain admittedly broadly worded *dicta* therein) they were intended to or do supplant the *per se* rule of *Klor's* on the facts of the instant case. There was thus no error in my charge.

The second instruction included in my charge to the jury that defendants assert is without legal basis was that:

> "The evidence has established that National maintained the only gas gathering lines in Chautauqua County and the immediately adjacent areas in 1975 and 1976. If you find that there were no feasible alternative means for gas producers in such area to transport their gas and that National's denial of access to its pipeline by Venture inflicted a severe harm on Venture, then you must find that the pipeline is an essential facility. The owner of an essential facility must share its use on fair and equitable terms, and the failure to do so as part of a contract, combination or conspiracy, is an unreasonable restraint of trade. If you find that National denied Venture the use of the pipeline to transport gas as part of a conspiracy to restrain trade, then you must find that the Defendants violated Section 1 of the Sherman Act;

> unless you find that sharing the facility would be impracticable or would be injurious to the legitimate interests of those already using the facility. For example, the refusal to allow Venture to connect to a pipeline would not be a violation if you found that the capacity of the line in question had been exceeded so that other producers would be forced to reduce their sales if Venture had been connected to the pipeline."

Defendants assert that this charge is not supported by the antitrust laws. They first assert taht the "essential facility" doctrine applies only to a "conspiracy to monopolize" claim under section 2 of the Sherman Act. Defendants cite no cases in suport of this proposition; ther is substantial authority holding such contracts in violation of section 1. *See, e.g., Associated Press* v. *United States,* 326 U.S. 1, 12 (1945) ("[T]he By-Laws on their face *** constitute restraints of trade"). Additionally, they contend that the "essential facility" doctrine applies only when the controller of the essential facility is in direct competition with the person being excluded and only if such exclusion is for the specific purpose, in this case, of extending National's monopoly in the distribution of gas and not for a legitimate business reason. Similar contentions were rejected by the United States Court of Appeals for the District of Columbia Circuit in its recent opinion in *Hecht* v. *Pro-Football, Inc., supra,* at 992. Therein, plaintiffs were a group of promoters seeking to operate a second professional football team in the Washington, D.C. area. The only feasible location for playing professional football in the area was R.F.K. Stadium, operated by the District of Columbia Armory Board. The court held that a clause in the lease between the Board and the Washington Redskins professional football team guaranteeing the Redskins exclusive use of the stadium for football purposes might be a restraint of trade in violation of sections 1 and 3 of the Sherman Act, under the essential facility doctrine. The Board was in no sense in competition with plaintiff, nor was there any suggestion that it was trying to extend or maintain a

"monopoly" over facilities for playing professional football. *See, id.*, at 992-93. My charge was deliberately modeled on *Hecht's* careful and studied opinion. Defendants recently called to my attention the case of *Official Airline Guides, Inc.* v. *Federal Trade Commission*, No. 80-4028 (2d Cir. Sept. 18, 1980). This case is wholly inapplicable to my charge as it relates to section 1 of the Sherman Act and does not in any way suggest that *Hecht, supra*, is not valid law in this circuit. Therein the court overturned a Federal Trade Commission order requiring a publisher of airline schedules to list those of "commuter" airlines in a manner comparable to those of major airlines. The commission was not basing its order on any finding of conspiracy between Official Airline Guide, Inc. and the airlines and the former was neither a consumer nor a supplier of a component of airline services. Both these factors featured prominently in the court's decision. There was no suggestion in the decision that a person having control of an essential facility, with interests in an adjoining market, could legally agree with another company engaged in that adjoining market to discriminate against a direct competitor to that other company. The freedom of a firm to refuse to deal is generally considered to be a freedom to do so in its "independent discretion." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Nothing in my charge on section 1 of the Sherman Act infringes on this freedom.

The second explicit, and the third effective, *per se* charge given to the jury concerned concerted price maintenance. I instructed the jury as follows:

> "The first of these special per se rules that may be applicable to this case is that of price maintenance. Agreements between competitors to manipulate or fix the price of their product are considered so inimical to free competition that such agreements are void per se. One form of such illegal price fixing is referred to as price maintenance. In price maintenance competitors

usually do not fix a definite price, but agree to engage in concerted conduct that is intended to or has the effect of maintaining prices at a higher level or a level higher than that which would have existed without the contract, combination or conspiracy. Venture contends that Defendants conspired to refuse to purchase gas at a price below the price escalator clause price, thus maintaining natural gas prices at an artificially high level. Plaintiff contends that it was willing to sell its gas at a constant rate lower than the price escalator clause rate, but that National refused to purchase gas on such terms. If you find that a defendant entered into a conspiracy with a competitor with a purpose to maintain the price of natural gas, then you must find that that Defendant [was in] violation [of] Section 1 of the Sherman Act. However, in determining whether the Defendant or Defendants so conspired, you may not consider as evidence the application made by National and supported by Flint to the New York State Public Service Commission [for] Commission approval of a price escalator term in National's gas purchase contract. The law permits businesses to act jointly in seeking such approval. Accordingly, any such joint application or the application of National supported by Flint is not illegal and may not in and of itself be considered by you as evidence of illegality. However, the mere fact that Defendants may have been acting wholly legally in jointly seeking this Public Service Commission approval does not insulate from liability other concerted conduct that would otherwise be illegal. To find a Defendant guilty of unlawful price maintenance you must determine that that Defendant agreed or conspired with the other Defendant or with a third party, that these two conspirators were competitors, that the purpose or the effect of such conspiracy was to maintain prices at a level higher than would otherwise exist, and that a member of the conspiracy performed some overt act, some act in furtherance of the conspiracy's purposes. If you determine that Plaintiff has by a fair preponderance of the evidence proved these factors, you will find that Defendant guilty of unlawful price maintenance. You

> will then consider the issues of causation and damages arising out of this violation. I stress to you, however, that only voluntary and concerted behavior maintaining the price of natural gas would be unlawful. It is not unlawful for one firm like National to decide on its own not to purchase supplies for less than a certain [price]. Also if National would not have been permitted or in good faith believed that it would not have been permitted to purchase gas at less than a certain price by the Public Service Commission, it has not violated the Sherman Act. Finally, National contends that if it refused to purchase Venture's production, it was not for the purpose of maintaining the price of natural gas, but because Venture had not followed its spacing policy or because of lack of capacity in its pipeline. If you accept National's explanation, then you may not find that they engaged in unlawful price maintenance.

Defendants offer two different objections to this charge — that any action taken by Distribution and Flint was constitutionally immune from antitrust scrutiny, and that it was improper to deliver this instruction on the grounds that there was no proof that Distribution and Flint were competitors. I will deal with those contentions in reverse order.

I charged explicitly that the jury must find that Flint and Distribution were competitors in order to attach liability. It is strongly presumed that a jury will follow a court's instructions; absent rebuttal of such presumption, if in fact there was no evidence that Distribution was a competitor of Flint, then the jury's verdict was evidently based on some other factor. Moreover, as noted before, there was evidence that Distribution's sibling Supply was a major holder of natural gas leases; such makes it at least a potential competitor of Flint. This objection therefore cannot stand. Defendants further argue that any maintenance of price was conducted in a highly regulated industry and pursuant to a petition to the Public Service Commission to permit an "escaltor clause" and is therefore immune from antitrust scrutiny. That an industry is

highly regulated overall is of little relevance to the antitrust laws. Unless an industry has received a specific antitrust exemption (which the natural gas industry has not), any action taken by a member thereof is potentially actionable under the antitrust laws unless it is commanded by the relevant regulatory body. Furthermore, such command must be specific. As an example, mere passive approval by a state of a tariff provision containing an allegedly anticompetitive item does not insulate it from scrutiny. *See, e.g., Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Parker* v. *Brown*, 317 U.S. 341 (1943). My jury charge dealt only with *concerted* price-maintenance; defendants do not even suggest that such was in any way mandated by the state. There was no general antitrust immunity applicable. Defendants further contend that any concerted action between Distribution and the natural gas producers relating to natural gas prices was immune from scrutiny under the *Noerr-Pennington* doctrine because such prices were the subject of a petition to the Public Service Commission. However, the cases forming the *Noerr-Pennington* doctrine make it clear that only concerted action directly in support of a petition to a governmental body is immune. Other concerted action, whether or not connected in some way with the petition, is not. *See, e.g., Mine Workers* v. *Pennington*, 381 U.S. 657, 670 (1965). Under *Noerr-Pennington*, defendants were free jointly to petition the Public Service Commission for an escalation clause; they were not free to combine to refuse to purchase gas from a producer who felt that such was not necessary. This was how the jury was instructed herein. There was no error in this portion of the charge.

IV. *Plaintiff's Motion for Costs and Attorneys' Fees*

Plaintiff herein has moved for in excess of $425,000 in attorneys' fees, plus more than $25,000 in costs and disbursements, and supported the same with an extensive affidavit

showing time spent. Defendants oppose the demand as not reasonable and request a hearing. I decline to approach this issue because it is as yet premature. Plaintiff is not yet the prevailing party herein. There will inevitably be an appeal; it is not certain that the United States Court of Appeals for the Second Circuit will agree with my determinations herein. Whatever the outcome of the appeal, substantial additional time will be spent therein, for which compensation will then be sought. A supplementary order and perhaps an additional hearing would then be needed. Efficiency will be served by postponing any award of fees herein until after appeal.

V. *Order*

For the reasons hereinbefore stated, it is hereby ORDERED that defendants' motions for a directed verdict in favor of National Fuel Gas Company is granted; that defendants' motions for a directed verdict, for judgment n.o.v. and for a new trial are in all other respects denied; and that plaintiff's motion for costs and attorneys' fees is denied without prejudice as premature.

Dated: Buffalo, N. Y.
January 9, 1982

/s/ JOHN T. ELFVIN,
U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1212; 1213 -- August Term, 1981

(Argued June 8, 1982 Decided July 26, 1982)

Docket Nos. 81-7069, 81-7107

VENTURE TECHNOLOGY, INC.,

Plaintiff-Appellee,

—against—

NATIONAL FUEL GAS COMPANY,

Defendant,

NATIONAL FUEL GAS DISTRIBUTION CORPORATION and FLINT OIL & GAS COMPANY, INC.,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge,*
CARDAMONE, *Circuit Judge*
and SAND, *District Judge.**

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* United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Western District of New York, John T. Elfvin, J., in favor of plaintiff under §1 of the Sherman Act, 15 U.S.C. §1, and the analogous provision of the New York Donnelly Act, N.Y. Gen. Bus. Law §340 (McKinney 1968). Judgment reversed and remanded.

GRANT S. LEWIS, New York, NY (LeBoeuf, Lamb, Leiby & MacRae, New York, NY, Frederick R. Dettmer, Charles C. Platt; Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, NY, William L. Rieth, Robert E. Glanville, of Counsel), *for Defendant-Appellant National Fuel Gas Distribution Corporation.*

ROBERT B. CONKLIN, Buffalo, NY (Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, NY, of Counsel), *for Defendant-Appellant Flint Oil & Gas Company, Inc.*

JAMES M. HARTMAN, Rochester, NY (Harris, Beach, Wilcox, Rubin and Levey, Rochester, NY, Edward C. Hooks, Eugene C. Holloway, III, Richard L. Smith, of Counsel), *for Plaintiff-Appellee.*

SAND D.J.,

National Fuel Gas Distribution Corporation ("Distribution") and Flint Oil & Gas Company, Inc. ("Flint") appeal from a judgment of the United States District Court for the Western District of New York (Elfvin, J.) awarding plaintiff Venture Technology, Inc. ("Venture") $1,500,000 in trebled damages. After an eight week trial, and one week of deliberation, the jury found that the appellants had violated §1 of the Sherman Act, 15 U.S.C. §1, and the analogous provision

of the New York Donnelly Act, N.Y. Gen. Bus. Law §340 (McKinney 1968),[1] but that there was no violation of §2 of the Sherman Act, 15 U.S.C. §2. Defendants' motions for a directed verdict, judgment n.o.v., and a new trial were denied as to Distribution and Flint, and judgment was entered on January 13, 1981.

Venture alleged, and the jury found, that Flint and Distribution conspired, in violation of the antitrust laws, to prevent Venture from entering the western New York gas production business and that Venture suffered substantial damages as a result.

Distribution and Flint raise several significant issues on appeal. First, the appellants contend that the evidence presented a trial was insufficient as a matter of law to permit an inference of conspiracy. Second, they assert that the court below erroneously instructed the jury as to per se violations of the antitrust laws, rather than charging according to the general rule of reason standard. The appellants claim that the trial judge committed reversible error by giving per se charges on a refusal to deal or group boycott theory, on a horizontal price fixing theory, and on an essential facility theory. Third, the appellants contend that Venture failed to prove that the defendants' conduct was a material and proximate cause of its alleged injury. They further assert that there was insufficient evidence at trial from which the jury could make a rational determination of damages and that the verdict was an impermissible compromise between liability and damages.

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1 The Donnelly Act was modeled after the Sherman Act, and the same standard applies under both statutes to the issues that are relevant here. *See, e.g., Saxe, Bacon & Bolan* v. *Martindale Hubbell, Inc.*, 1981-2 Trade Cases ¶64,212 at 73,815, 73,818 (S.D.N.Y. 1981); *Optivision, Inc.* v. *Syracuse Shopping Center Associates*, 472 F.Supp. 665, 580-81 (N.D.N.Y. 1979). Although our discussion speaks only in terms of the plaintiff's Sherman Act claims, it is applicable as well to the plaintiff's claim under the Donnelly Act.

A plaintiff in a civil action, in order to sustain its claim under §1 of the Sherman Act, must prove the existence of a "contract, combination . . . , or conspiracy."[2] In light of our conclusion that there was not sufficient evidence to prove the existence of such a relationship in this case, we do not reach the appellants' other contentions.

A. *FACTS*

The record shows that Distribution, a wholly owned subsidiary of co-defendant National Fuel Gas Company, is a public utility which supplies natural gas to consumers in western New York, western Pennsylvania, and a portion of Ohio.[3] At the time of the operative events in this case, Distribution received a small portion of its gas supply from local sources and about 90% of its gas supply from interstate pipelines, originating primarily in the southwestern United States.

In the early 1970s, Distribution's predecessor, Iroquois Gas Company ("Iroquois"), sought to induce independent companies to drill wells and produce the gas which Iroquois would purchase. Iroquois therefore began to assign, or "farm out," some of its acquired gas leases to independent production companies. This purchase program was later administered by Distribution under the management of John Fox, the assistant secretary and director of gas purchases for Distribution.

Flint was formed in the early 1970s, and by 1975 it had drilled between 100 and 200 wells and was one of the largest

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2 15 U.S.C. §1. As a matter of convenience, we use the word "conspiracy" in this Opinion to include all three statutory terms.

3 National Fuel Gas Company is also the parent of National Fuel Gas Supply Corporation ("Supply"), which acquired gas for resale by Distribution. In 1975 and 1976, Supply produced about 3-4% of the gas sold to Distribution.

sellers of western New York natural gas to Distribution. There was substantial contact between officers of Distribution and officers of Flint, particularly by Fox. Fox attended some of the meetings Flint held to attract investors and answered questions about the natural gas purchase program. He helped Flint obtain a number of its well sites and regularly visited Flint's offices and met with its board of directors to provide "advice and counsel."

Fox reaped substantial financial benefits from his relationship with Flint. Fox and his wife operated Priority Acquisitions, Inc. ("Priority"), a real estate agency which acquired approximately 200 leases for Flint, and which was paid one dollar per acre by Flint for each lease. Priority never secured such leases for other producers in the western New York area. In 1973, Priority arranged the sale of a 167 acre parcel located in Alden, New York to Flint for $100,460, the same price that had been offered by another prospective purchaser. The property had been purchased by the seller in 1971 for $50,000. Flint sold the property in January, 1980 for $102,000. Priority's commission on the sale to Flint was more than $17,000. It is undisputed that Distribution was aware of the Priority/Flint relationship and approved of it.

Venture was formed by William L. Waytena to engage in the gas production business. Waytena had previously been an investor in several of Flint's drilling projects, and he continued his investments in Flint activities at least through the time of the trial. Waytena testified that it was his intention to have Venture drill a few successful wells, thereby demonstrating Venture's capability, and then to launch a well drilling program financed by outside investors.

By November, 1975, Venture had made plans for wells on five leased sites, known as the Boyd, Grant, Frey, Bennett, and Nickerson sites. Venture commenced work, apparently assuming that any gas it produced would be purchased by

Distribution. However, none of Venture's officers approached Distribution to discuss purchase contracts before Venture began drilling.

At about this time, Flint's President, Salvatore Giallombardo called Fox to complain about Venture. According to the testimony, their conversation was limited to Giallombardo's insistence that Venture's wells were located too close to Flint's and his demand that Distribution honor its commitment to buy Flint's gas before it obligated itself to purchase from Venture.[4]

On November 19, 1975, representatives of Distribution met for the first time with Venture's officers. Distribution's Henry Steadman and Allen Graham indicated that their company was in the process of developing a well-spacing policy, which would establish restrictions on the location of wells from which Distribution would purchase gas. Venture was shown the New York State regulations governing well-spacing as a guide to what Distribution's forthcoming policy might require. Graham stated that he was unable to set a price for the purchase of Venture's gas until after resolution of Distribution's pending application before the New York State Public Service Commission for approval of a price escalator clause in its gas purchase contracts. Venture offered to sell gas at the prevailing rates and, according to Waytena, the meeting ended with an understanding that Distribution would purchase Venture's gas.

A few days later, Venture received a copy of Distribution's spacing policy and a request for more information about its leases. The spacing policy provided that Distribution would not

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4 There was substantial evidence that, during this time, Distribution was suffering from pipeline bottlenecks and that some wells, among them Flint's, awaited hook-up for nearly a year.

purchase gas from wells on leases of less than 40 acres, located closer than 1320 feet from another well, or located less than a certain number of feet from dwellings, property lines, and roads. This policy was similar to the regulations of New York's Department of Environmental Conservation, but, unlike those regulations, it applied retroactively to areas in which there was previous drilling. The spacing requirements were said to be necessary to protect drillers' financial expectations by preventing others from drilling into the same pool of gas and to protect a landowner from the draining of gas reserves under his land by a well located on an adjoining small property. Distribution's policy permitted it to waive the spacing requirements in particular circumstances.

On December 3, 1975, representatives of Venture and Distribution met again, and Venture was informed that gas from the Boyd and Grant sites would not be purchased, at least in part because these wells did not comply with the spacing policy. Although Venture was told at that time that it would be able to drill at the Frey site, Fox informed it two days later that the proposed Frey well was too close to a proposed Flint well from which Distribution was committed to buy gas.

A Public Service Commission hearing was held on December 4, 1975, at which Distribution was seeking to justify the price escalator clause employed in its gas purchase contracts. The evidence indicates that when William Lerner, Venture's attorney, began to testify that the clause was not necessary, he was "shouted . . . down" by Giallombardo.

On December 17, 1975, Distribution advised Venture that it would ask Flint to work out the spacing policy conflicts as to the Frey site, and there was evidence that steps to accomplish this were taken. On December 23, 1975, Frey's attorney wrote to Lerner, declaring Venture's lease null and void since drilling had not begun within the time set in the lease, and the next day a lease for the same property was executed with Flint. There

was evidence that Flint had previously advised Frey that Venture would have difficulty selling its gas to Distribution and that Flint would have no such problem. Furthermore, when the owner of the Frey leasehold asked Distribution about other producers who might be able to drill on his property, Fox mentioned Flint, as well as some other producers. When Flint did drill a well on the Frey site, Distribution purchased its output. Soon after it lost the Frey lease, Venture allowed its leases for the Nickerson and Bennett properties to expire, and Clearwater, another company formed by Waytena, acquired drilling rights at these sites. Distribution bought gas from both of these Clearwater wells.

In May, 1976, immediately prior to filing suit, Waytena bought out the interests of Venture associates Panaro and O'Neill, who each owned one-third of Venture, for $5,000 each, thereby acquiring all of the shares of Venture. All of Venture's major participants, including Waytena, continued their activities in the gas supply business through other corporate entities.

B. *THE SUFFICIENCY OF THE EVIDENCE*

The appellants argue that the evidence was insufficient as a matter of law to permit an inference of a conspiracy between Distribution and Flint. This Court must determine whether the evidence, viewed in the light most favorable to the plaintiff, was sufficient to support the verdict rendered. *Schwimmer* v. *Sony Corp. of America,* Docket No. 81-7135, 2422 (2d Cir. May 3, 1982) (slip op.); *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, 662 F.2d 935, 937, 940 (2d Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215). We must ascertain whether " 'there can be but one reasonable conclusion as to the proper judgment' . . . To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury." *Moore Drug, supra,* at 940,

quoting 5A Moore's Federal Practice ¶50.07[2] (2d ed. 1980). *See Beech Cinema* v. *Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1107-08 (2d Cir. 1980).

Upon review of the record in this case, this Court is convinced that there was not sufficient evidence from which the jury could rationally conclude that Distribution and Flint had entered into a conspiracy to keep Venture from entering the western New York gas production business.

As this Court has explained, §1 of the Sherman Act

> "is directed only at joint action. . . . It does not prohibit independent business actions and decisions. A person still has the right to refuse to do business with another, provided he acts independently and not pursuant to an unlawful understanding, tacit or expressed. Fundamental then to any §1 claim is the finding of an agreement, express or otherwise, between two or more persons."

Modern Home Institute, Inc. v. *Hartford Accident and Indemnity Co.*, 513 F.2d 102, 108-09 (2d Cir. 1975) (citations omitted). Illegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators. *See Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976). It is clear, however, that "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose of a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).

Recent cases in this Court, on which the appellants rely, have dealt with particular fact situations in which the evidence was insufficient as a matter of law to warrant the inference of conspiracy. In *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 102 S.Ct. 639 (1981), for instance,

we affirmed a directed verdict for the defendant, and held that "[a] mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement," *Id.* at 79. Less than a year later, we stated:

> "Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them. . . . Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them."

Moore Drug, supra, at 941 (citations omitted). *See also Schwimmer, supra,* at 2425-26; *Oreck, supra,* at 80.

When we measure the evidence here against the standards laid down in *Oreck* and *Moore Drug,* we must do so in the light of the history and circumstances in the industry in which the parties were engaged. Upon such consideration, we find that, for a number of reasons, the evidence presented at trial falls far short of the requirements set forth in those cases.

In our decision in *Oreck,* we rejected the contention that the inherent relationship between Whirlpool and its largest customer and an important shareholder, Sears, was sufficient to support an inference of antitrust conspiracy. This was so despite proof of meetings between the two companies, Sears' complaints about the plaintiff, and Sears' ownership of the tools used to manufacture Whirlpool's products. The Whirlpool/Sears relationship was practically one of dependency, and surely was stronger, more apparent, and more significant to the parties than the Distribution/Flint relationship here.

From Distribution's standpoint (putting to one side for the moment Flint's alleged corruption of Fox), the entire Venture matter was not of great moment. Of all the natural gas purchased and resold by Distribution, only a small percentage was locally produced, and there were a significant and growing number of independent producers. Although Flint was one of the two largest local producers, its 100 to 200 wells and its willingness to drill further, can not have been of prime concern to Distribution.

Venture sometimes contends that Distribution sought to punish it for having the temerity to oppose the price escalation and short tract well-spacing policies. But such evidence makes it neither more nor less likely that Distribution acted unilaterally, and is, in any event, largely conjectural. For that reason, Venture stressed here, as it did before the jury, the theory that Fox, Distribution's chief purchasing executive, had been bribed and had "sold his soul" to Flint.

The plaintiff makes much of the fact that Fox met with Flint's potential investors. However, this conduct appears unremarkable in light of the evidence that Fox often met with drillers and investors, albeit not in formal meetings, as part of his efforts to induce producers to commence operations in western New York. Even more importantly, Priority's involvement in the sale of the Alden property (the alleged corruption) took place approximately one year prior to Venture's formation, and Flint purchased this property at the identical price which had been negotiated with another potential buyer. There is simply no evidence whatsoever that the payments to Priority served as consideration for Distribution's alleged anti-Venture actions. As in *Oreck*, this evidence merely shows close relations, and fails to demonstrate that Flint and Distribution engaged in conspiratorial conduct.

respect to the policy is rendered even less convincing by the evidence that Flint received only a small percentage of the spacing waivers it sought, and that Distribution took some steps to work out an accommodation between Flint and Venture as to the Frey lease's spacing problems.

The evidence of attempted accommodation also undermines the contention that the circumstances surrounding the Frey lease point to a conspiracy. Additional evidence demonstrates that Frey declared Venture's lease null and void since Venture had not begun its drilling operations in the time specified by the lease. This was an important provision to Frey since timely drilling would provide him with various tax advantages, and only through sheer speculation could a jury conclude that Distribution and Flint engineered Frey's termination of Venture's lease.

For the reasons set forth in the *Oreck* line of cases, Giallombardo's complaints about Venture do not support an inference of illegal agreement. There was no evidence that Giallombardo complained about anything other than Venture's violation of the spacing policy and the threat of Distribution's committing to buy Venture's gas before it had honored its commitment to purchase Flint's gas. These are normal business concerns which in no way point to conspiracy.

Venture has argued that this Court should consider, as evidence of conspiracy, Distribution's failure to make limited commitments to purchase gas drilled by Venture when pipeline capacity was increased or on such terms as the Public Service Commission would approve. There is no evidence, however, that Venture ever sought such commitments. Venture further relies on evidence which it contends demonstrates the pretextual nature of Distribution's statements that its decisions about Venture were taken because of inadequate pipeline capacity and because of its pending application before the Public Service Commission. This Court has explicitly addressed

the inadequacy of such evidence in *Moore Drug*, holding that the advancement of pretextual reasons for the type of conduct at issue in this case does not by itself justify the inference that the conduct was the result of a conspiracy. The most that the jury could permissibly infer from such evidence is that Distribution had some reason other than its pipeline capacity or its Public Service Commission application for its actions.

In sum, there was no evidence in this case that would permit the inference that Distribution and Flint had "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co., supra,* at 810. In reaching this conclusion, we recognize that conspirators usually act covertly and that if we require too great a degree of proof, we may weaken the effect of the Sherman Act and thwart its beneficial purposes. But one who alleges that he is a victim of an antitrust conspiracy and seeks to impose the heavy sanctions of the Sherman Act upon the accused, must show more than the existence of a climate in which such a conspiracy may have been formed.[5] In this regard, it is not the quantity of the plaintiff's evidence which is important, but its qualitative value in demonstrating that the parties actually entered into a conspiracy. As we have noted above, evidence regarding the relationship of these parties to each other, the actions and decisions alleged to constitute illegal activity in this case, and the history of the western New York gas production industry, provide a substantially weaker basis

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5 As discussed above, we do not reach the damage issues raised by the appellants. We note, however, that Venture was simply one of Waytena's many natural gas investments, that it was a highly speculative operation, and that it had engaged in comparatively little activity with a limited expenditure of funds during the few months of its participation in the western New York gas production industry. In this context, it is not unjust to require that Venture show more than conjecture and surmise to reap the windfall of a treble damage award of $1,500,000 plus legal fees.

for an inference of conspiracy than was present in either *Oreck* or *Moore Drug*. Even taken as a whole, the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion. The evidence was therefore insufficient as a matter of law to support a finding of conspiracy.

The judgment of the lower court is reversed and the case is remanded for the entry of judgment in favor of the defendants.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

PLEASE REFER TO THIS COURT'S
DOCKET NUMBER IN ALL MATTERS

July 26, 1982

Re: VENTURE TECHNOLOGY, INC., v. NATIONAL FUEL GAS COMPANY, et al. Docket Nos. 81-7069 & 81-7107

Dear Sir/Madam:

The Court has today handed down a decision in the above entitled cause reversing and remanding the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with §0.17[7] of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39[c] F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,
A. DANIEL FUSARO
Clerk

APPENDIX D

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 1 of the Sherman Act, 15 U.S.C. §1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Rule 50 of the Federal Rules of Civil Procedure provides:

> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict

made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

No. 82-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VENTURE TECHNOLOGY, INC.,

Petitioner,

—against—

NATIONAL FUEL GAS DISTRIBUTION CORPORATION and FLINT OIL & GAS COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NATIONAL FUEL GAS DISTRIBUTION CORPORATION IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals applied an improper standard of review when it concluded that "there was not sufficient evidence from which a jury could rationally conclude that Distribution and Flint had entered into a conspiracy to keep Venture from entering the western New York gas production business?"

2. Whether the Second Circuit erred when it held that an inference of conspiracy was impermissible since Venture failed to show that Distribution and Flint had "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement?"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VENTURE TECHNOLOGY, INC.,

Petitioner,

—against—

NATIONAL FUEL GAS DISTRIBUTION CORPORATION and FLINT OIL & GAS COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NATIONAL FUEL GAS DISTRIBUTION CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

Respondent National Fuel Gas Distribution Corporation ("Distribution") is a public utility supplying natural gas at retail to customers in western New York, Pennsylvania and part of Ohio. In 1975, Distribution received about 80-90% of its gas supply from interstate pipelines originating in the southwestern United States. A small portion of Distribution's gas supply was received from local sources. (App. B-4.)*

* "App." refers to the Appendices to the Petition for Certiorari; "Pet." refers to the Petition for Certiorari; and "JA" refers to the Joint Appendix to the Briefs submitted to the United States Court of Appeals for the Second Circuit.

Petitioner Venture Technology, Inc. ("Venture"), a corporation organized in September 1975, sought to produce natural gas in western New York and sell it to Distribution during the Fall of 1975. At the time, Distribution had approximately 35 other local suppliers, including respondent Flint Oil & Gas Co., Inc. ("Flint"). (App. B-12.) Instead of meeting with Distribution's management to ascertain Distribution's current requirements, Venture simply acquired short-term leases and began to drill. (App. B-5-6.) When Venture representatives thereafter met with Distribution's executives, they were advised that for various business reasons Distribution did not then wish to purchase gas from the two wells Venture had drilled. Distribution expressed a willingness to deal with Venture in the future and to assist its entry into business. Nevertheless, Venture's principals abandoned their efforts to commence operations through Venture and drilled for natural gas through other corporate entities, some of which supplied Distribution. (App. B-8, 12.)

This action was commenced in May, 1976. (App. B-8.) Venture alleged in its complaint, among other things, violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In view of Distribution's natural monopoly as a utility providing gas in its service area, much of Venture's effort at trial was devoted to its claim that Distribution's purchasing practices did not satisfy the obligations that Venture argued were imposed on a monopsonist by Section 2. The jury rejected this claim, but upheld Venture's claim under Section 1. (App. B-2-3.)

Distribution then moved for a judgment notwithstanding the verdict pursuant to Rule 50(b), Fed. R. Civ. P., or a new trial. Some nine months later, the District Judge, writing without the benefit of a trial transcript, denied the motion in a lengthy opinion. (*See* App. A.) On appeal, aided by transcript references, the Second Circuit reversed, holding that Venture's evidence was insufficient as a matter of law to permit an inference of a conspiracy.[1] (*See* App. B.)

1 Since the Second Circuit's holding on the conspiracy issue was dispositive, the Court recognized that it need not reach the "several

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW

A. The Second Circuit Followed The Principles Enunciated By This Court And Deferred To The Role Of The Jury In Determining Questions Of Fact

Venture's petition urges first that "[t]he Second Circuit's decision is squarely at odds with the teachings of this Court in *Continental Ore*,[2] *Inwood*,[3] and *Pullman*,"[4] arguing that the Second Circuit failed to recognize the role of the jury in determining questions of fact. (Pet. at 17.) The decision, from which Venture fails to quote a single sentence in its entirety, speaks for itself.

Following the standard set forth by this Court,[5] the Second Circuit recognized that its role was to "determine whether the evidence, viewed in the light most favorable to the plaintiff, was sufficient to support the verdict rendered. . . ." (App. B-8.) It emphasized that it must defer to the jury unless "there

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[other] significant issues" raised by defendants on their appeal. (App. B-3.) If this Court were to grant Venture's Petition, and then reverse, the "affirmance of the District Court judgment" (Pet. at 17) that Venture seeks would be unwarranted. At the very least, it would be necessary to remand the case to the Court of Appeals for resolution of the other undecided issues.

2 *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962).

3 *Inwood Laboratories v. Ives Laboratories, Inc.*, ___U.S.___, 50 U.S.L.W. 4592 (U.S. June 1, 1982) (No. 80-2182).

4 *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ___U.S.___, 50 U.S.L.W. 4425 (U.S. April 27, 1982) (No. 80-1190).

5 *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Gunning v. Cooley*, 281 U.S. 90, 93 (1930).

can be but one reasonable conclusion as to the proper judgment. . . . To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury." (App. B-8.)[6] After applying this well-established standard to plaintiff's evidence, both individually (App. B-11-14) and "taken as a whole" (App. B-15), the Second Circuit determined that "there was not sufficient evidence from which the jury could rationally conclude that Distribution and Flint had entered into a conspiracy to keep Venture from entering the western New York gas production business." (App. B-9.)[7]

B. The Second Circuit Reviewed Only The Evidence That Was Favorable To Plaintiff Or That Was Uncontradicted And Unimpeached

Apparently believing that the grant of *certiorari* in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S.____, 50 U.S.L.W. 4592 (U.S. June 1, 1982) (No. 80-2182), and *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ____U.S.____, 50 U.S.L.W. 4425 (U.S. April 27, 1982) (No. 80-1190), evidences this Court's general interest in the subject

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6 In numerous other recent cases, the Second Circuit has similarly recognized the great deference due a jury's determination of questions of fact. *See, e.g., Sirota v. Solitron Services, Inc.*, 673 F.2d 566, 573-574 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3005 (U.S. June 25, 1982) (No. 81-2367); *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1110 (2d Cir. 1980); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*, 574 F.2d 106, 112 n.10 (2d Cir. 1978).

7 Venture also suggests that the District Court's opinion is entitled to deference because the District Judge presided over the trial in this case. (Pet. at 11-12, 15.) This is incorrect; a District Court deciding a motion for judgment n.o.v. and a Court of Appeals reviewing the grant or denial of such a motion must apply the same legal standard in determining the sufficiency of the evidence. *Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 198 (2d Cir. 1979); *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*, 574 F.2d 106, 112 n.10 (2d Cir. 1978). Only the jury's findings and conclusions are entitled to deference.

of the standards for appellate review, Venture seeks to invent such an issue in this case. Venture charges that the Second Circuit erred when it decided *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976),[8] a case not even cited in the decision below, and accuses the Second Circuit of flouting fundamental principles of appellate review since that time. Venture argues, again without quotation from any opinion, that the Second Circuit believes that "it may review all the evidence before the trial court and may overturn the jury verdict on the basis of any contradictory testimony" (Pet. at 2), and that, as a result, that Court now substitutes "its judgment for that of the trier of fact." (Pet. at 19.)

Despite Venture's attempt to create an issue for this Court's review, it is clear from the opinion below that the Second Circuit did precisely what plaintiff claims it should have done; that is, it considered only the evidence favorable to plaintiff and the uncontradicted and unimpeached evidence introduced by defendants.[9]

Plaintiff sought to prove a conspiracy "to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County." (Pet. at 3.) Summarizing the evidence that it offered, Venture refers to "the relations between Distribution and Flint, favored treatment of Flint, payments from Flint to one of Distribution's officers, complaints from Flint about Venture, the curious

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8 Venture cites this case without noting that *certiorari* was denied by this Court.

9 Other Second Circuit decisions following *Epoch* which considered challenges to jury verdicts for plaintiffs have similarly limited their review to the evidence that was favorable to plaintiff or uncontradicted and unimpeached. *See, e.g., Gehrhardt v. General Motors Corp.*, 581 F.2d 7, 10 n.3 (2d Cir. 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 956 (2d Cir. 1978), *cert. denied*, 459 U.S. 1072 (1979); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *see also Unijax v. Champion Int'l, Inc.*, 683 F.2d 678, 684 (2d Cir. 1982); *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980).

circumstances of the Frey transactions, a selectively and retroactively imposed spacing policy, and *post hoc* rationalizations of otherwise commercially irrational business conduct." (Pet. at 21.)

The only evidence to which Venture refers that involved communications between Distribution and Flint *concerning Venture* was the deposition testimony of John Fox, who did not testify at trial, that Flint complained of Venture's plan to locate a well too close to existing Flint wells. Flint's president, Mr. Giallombardo, also expressed "grave concern" and "began to rant and rave" upon learning that Distribution was considering taking gas from two Venture wells at a time when Distribution was not honoring existing commitments to take gas from Flint wells in the same area because of insufficient pipeline capacity.[10] The Second Circuit considered only the evidence favorable to plaintiff concerning this communication[11] and properly concluded that Flint's complaint reflected only "normal business concerns which in no way point to conspiracy." (App. B-13.)

Plaintiff contends that "[t]he Second Circuit accepted Fox's and Giallombardo's explanation of their conversations concerning Venture—that they were limited to Distribution's existing obligation to purchase Flint's gas and the closeness of Venture's well," and disregarded the District Court's conclusion that the jury was not required " 'to accept [the defendants'] interest-motivated testimony as to the limits of their conversation.' " (Pet. at 13, *quoting* App. A-12.)[12] Plaintiff

10 Some 70 to 100 completed wells in that area had awaited hookup to Distribution's pipeline for as long as a year. (JA 1136-1137, 2092.)

11 The Second Circuit did not note that Mr. Giallombardo testified that he did not recall having had such a conversation. Nor did it rely on his uncontradicted testimony that he had never complained about Venture's entry into business in competition with Flint, although even under the standard urged by Venture, it could properly have done so. (JA 1423-1430, 1517.)

12 In fact, Fox was not employed by Distribution when he was deposed. Rather, he was the president of a company involved in major litigation against Distribution. (JA 811A-811B, 1012A, 2063.)

asserts that this demonstrates the utilization of an improper standard of review by the Second Circuit. Rejection of the testimony regarding the conversation, however, would leave the record devoid of the only evidence of a complaint by Flint to Distribution concerning Venture. A jury may not properly find a conspiracy based on its speculation as to what else might possibly have been said.

The remaining evidence to which Venture refers to prove the alleged conspiracy concerned either (1) dealings between Flint and Distribution wholly unrelated to Venture, or (2) actions taken by Distribution without consultation with, or the involvement of, Flint. The Second Circuit considered all of this evidence, taking account only of evidence favorable to plaintiff or other uncontradicted and unimpeached evidence, before concluding that Venture had failed to prove a conspiracy as a matter of law.

Venture stressed the "long-standing relationship" between Flint and John Fox, Distribution's assistant secretary and director of gas purchasing, arguing that Fox had "sold his soul" to Flint. (*See* App. B-11.) Plaintiff contends that this "evidence supplied a motive [for Distribution and Flint to act in concert], demonstrating 'far more than mere contacts. . . .' " (Pet. at 12, *quoting* App. A-14.) The Second Circuit recognized and fully credited all of this evidence of close relations (*see* App. B-4-5, 10-11), while also recognizing the uncontradicted and unimpeached evidence that Fox was responsible for running Distribution's program to increase local natural gas production and that, as a result, he necessarily worked closely with Flint, as he did with numerous other local producers.[13] (Because of these efforts, the number of local producers increased from about 10 in 1970, to 35 in 1974, to over 100 at the time of trial.) (App. B-12; JA 897-899, 1909, 2050-2051.)

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13 Venture also claims that Flint received "favored treatment" because Fox agreed to meet with potential Flint investors when asked to do so. (Pet. at 3, 12, 21.) There was no suggestion at trial that Venture (or anyone else) ever made a similar request and was turned down.

Plaintiff also asserts that the Court of Appeals failed to explain why Fox's assistance to Flint through Priority Acquisitions, Inc. ("Priority"), a real estate brokerage firm he created before joining Distribution in 1969 (*see* App. B-5, 11), was insufficient evidence to establish the conspiracy it sought to prove. (Pet. at 12.) However, uncontradicted and unimpeached evidence established that Priority's activities terminated in 1974 when Fox moved to Houston, almost a year before Venture was created and almost a year before the first meeting between representatives of Distribution and Venture.[14] As the Second Circuit recognized (App. B-11):

> There is simply no evidence whatsoever that the payments to Priority served as consideration for Distribution's alleged anti-Venture actions. . . . [T]his evidence merely shows close relations, and fails to demonstrate that Flint and Distribution engaged in conspiratorial conduct.

The other evidence to which Venture refers involved actions taken by Distribution alone, with no involvement of Flint. After the first meeting between representatives of Distribution and Venture on November 19, 1975,[15] Distribution decided not

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14 Venture's assertion that Fox received money from Flint at or after the time Venture was created (Pet. at 12) finds no support in the record. In 1973 Flint purchased a piece of property, paying 25% down and agreeing to pay the remainder over 5 years. Between 1976 and 1978, Priority received a commission from the seller of the property pursuant to a 1970 agreement which called for Priority to receive no compensation until the seller actually realized a profit. In 1976, the seller began to realize his profit. (App. B-5; JA 882-887, 1011, 1415-1417, 1562-1563, 2583.)

15 At that meeting, according to Mr. Waytena, Distribution agreed to purchase gas from the Boyd and Grant wells after the New York Public Service Commission had approved Distribution's proposed "price escalation" clause for gas purchase contracts. The Second Circuit accepted this testimony (App. B-6), although the five other participants at the meeting, including three other Venture officers (two of whom testified for Venture at trial), denied that any such commitment was made. (JA 221, 470-474, 1123, 1955, 2099.)

to take the gas offered by Venture from its Boyd and Grant wells. There was no evidence suggesting that this decision was other than wholly unilateral. Nor was there any evidence that Distribution was unwilling to take gas from other Venture wells; rather, the evidence was uncontradicted that Distribution had offered to take gas from those wells. (JA 2381-2382, 2409, 2465, 2471.)

One of the principal reasons for Distribution's unwillingness to take gas from the Boyd and Grant wells was their failure to conform to Distribution's well-spacing policy, which was issued on November 21. There was no evidence that Flint (or any other producer) played a role in Distribution's decision to adopt the policy, its determination of the policy's requirements (which were similar to New York State's own regulations), or the timing of the policy's implementation.[16] Indeed, Flint was vigorously opposed to any such spacing policy; after the policy was adopted, Flint moved most of its operations from New York to Ohio because it felt the policy was too restrictive. (App. B-7, 12.)[17] Also, when the well-spacing policy was

16 In its Petition, Venture quotes a statement from the District Court's opinion that "the spacing policy was rushed into place, and on a retroactive basis, within three days of Giallombardo's complaint. . . ." (Pet. at 13, *quoting* App. A-14.) As indicated above, the District Court's opinion was written without the benefit of the trial transcript. After that transcript was prepared, Distribution, in its Brief to the Second Circuit, pointed out that the record contained no evidence to support the District Court's statement, and Venture did not argue to the contrary. Venture obviously should not be relying on the District Court's mistaken understanding of the record in filings with this Court.

17 Plaintiff argues that the spacing policy may be viewed as "an act in furtherance of the conspiracy" (Pet. at 9, 16 n.8) and that the Second Circuit erroneously "wrote Distribution's spacing policy, and particularly its application to Venture, out of the case simply because Flint did not participate in the formulation of the policy and objected to its implementation." (Pet. at 9.) While a conspirator is liable for acts taken by a co-conspirator in furtherance of a conspiracy that has been proved, the only issue addressed by the Second Circuit, or Venture's petition, is whether a conspiracy was shown.

formulated, Distribution had not yet met with Venture, and thus did not know when drilling would commence on the parcels on which Venture was to drill or whether Venture would satisfy the requirements of the policy.[18]

As the Second Circuit recognized (App. B-12):

> The plaintiff's reliance on Distribution's well-spacing policy to support an inference of conspiracy must fail since there was no evidence that Flint had any role in the adoption of the policy or the timing of its implementation. Any claim of unity of purpose, common design and understanding, or meeting of the minds based on this policy cannot be credited given Flint's clear and consistent public objections to it and the uncontroverted evidence that the policy substantially harmed Flint and was a factor in its move to Ohio.

Venture also asserts that the circumstances surrounding Mr. Frey's decision to terminate his lease with Venture support an inference of the claimed conspiracy between Distribution and Flint to prevent its entry into business without ever explaining why this should be so. As the Second Circuit noted (App. B-13):

> Additional evidence [which was uncontradicted and unimpeached] demonstrates that Frey declared Venture's lease null and void since Venture had not begun its drilling operations in the time specified by the lease. This was an important provision to Frey since timely drilling would provide him with various tax advantages, and only through sheer speculation could a jury conclude that

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18 It was undisputed at trial that Distribution began work on the spacing policy in March 1975, long before it had ever even heard of Venture, and that the "problem" being addressed was close placement of wells, not Venture, despite Venture's contrary suggestion to this Court. Nor was it disputed that the policy was developed by a number of individuals, including Fox, who continued to be involved in local production matters despite his move to Houston.

> Distribution and Flint engineered Frey's termination of Venture's lease.

Finally, Venture asserts that its opposition to the "price escalation" clause may have caused Distribution's refusal to take gas from the Boyd and Grant wells, and that it was "commercially irrational business conduct" for Distribution not to purchase gas being offered without a price escalation provision.[19] (Pet. at 9.) The undisputed evidence was that Venture's "opposition" to the price escalation did not arise until December 4, 1975, the day after Distribution declined to take Venture's gas. As the Second Circuit recognized (App. B-11):

> Venture sometimes contends that Distribution sought to punish it for having the temerity to oppose the price escalation and short tract well-spacing policies. But such evidence makes it neither more nor less likely that Distribution acted unilaterally, and is, in any event, largely conjectural.

In sum, the Second Circuit reviewed the evidence, both separately and taken as a whole, "in the light most favorable to plaintiff . . . , [to determine] whether 'there can be but one reasonable conclusion as to the proper judgment. . . .'" (App. B-8.) It concluded that "the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion." The Court therefore recognized that "[t]he evidence was . . . insufficient as a matter of law to support a finding of conspiracy." (App. B-15.)

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19 Distribution sought, and received, permission from the New York Public Service Commission to modify the price escalation clause in its gas purchase contracts in order to meet competition from gas utilities in other areas.

II

THE COURT OF APPEALS FOLLOWED ESTABLISHED STANDARDS UNDER THE SHERMAN ACT FOR DETERMINING WHETHER A CONSPIRACY HAD BEEN SHOWN.

Venture's claim that the Second Circuit requires that "the plaintiff present direct evidence of a contract or agreement" (Pet. at 21) to sustain an inference of conspiracy is another of its claims that is contradicted by the opinion itself. The Court of Appeals recognized that "[i]llegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." (App. B-9.) It went on to explain that "if we require too great a degree of proof, we may weaken the effect of the Sherman Act and thwart its beneficial purposes." (App. B-14.) Quoting from *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), the Second Circuit made clear that all it expected of plaintiff was to show that "the circumstances . . . [were] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (App. B-9.)

In an effort to create a supposed conflict between the Second Circuit and some other circuit court, Venture states that the Seventh and Eighth Circuits have held, in dealer termination cases, that "evidence of dealer complaints followed by responsive acts by a manufacturer was sufficient to support an inference of conspiracy." (Pet. at 21-22.) It suggests, citing the Second Circuit's decisions in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 16, 1982) (No. 82-277), that on the facts of those cases,

a different result might have been reached in the Seventh or Eighth Circuits.

The question of a possible conflict among the circuits as to the proof required to show the existence and enforcement of a conspiracy to impose vertical restraints when a manufacturer responds to dealer complaints is undoubtedly addressed in the petitions now before this Court in *Moore* and *Schwimmer*. Venture's suggestion that the "petitions filed in *Moore* and *Schwimmer* raise many of the same issues presented here" (Pet. at 11-12 n.5), is an obvious effort to come under the umbrella of a conflict that is claimed to be presented by those other cases.

In the present case, Venture alleges that defendants sought "to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County." (Pet. at 3.) As indicated above, there was simply no evidence of a Flint complaint about Venture's entry. (*See* App. B-6, 13.) Nor was there any evidence of any general unwillingness of Distribution to deal with Venture. On the contrary, Distribution made repeated offers to purchase gas from Venture wells conforming to its spacing policy. Further, when Venture's principals transferred its interests to other companies, Distribution purchased from them. In short, if there is a conflict among the circuits on the issue raised in *Moore* and *Schwimmer*, it is not presented by the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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